SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964/1965

No. 817 44

GERALD SEGAL, INDIVIDUALLY AND D/B/A SEGAL COTTON PRODUCTS, ET AL., PETITIONERS,

vs.

WILLIAM J. ROCHELLE, JR., TRUSTEE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MAY 27, 1965

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In the matters of

GERALD SEGAL, Individually and d/b/a
Segal Cotton Products.

No. 4951 Bankruptcy

SAM SEGAL, Individually and d/b/a
Segal Cotton Products.

No. 4952 Bankruptcy

SEGAL COTTON PRODUCTS, A partnership
Composed of Gerald Segal and Sam Segal.

No. 4953 Bankruptcy

Henry Klepak, 1509 Mercantile Bank Building, Dallas, Texas, Representing the Bankrupts.

William J. Rochelle, Jr., Trustee in Bankruptcy for said Bankrupts, Republic Bank Building, Dallas, Texas.

Elmore Whitehurst, Referee in Bankruptcy, Federal Building, Dallas, Texas.

[fol. 2] Clerk's Certificate (omitted in printing).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

CERTIFICATE OF REVIEW—Filed June 19, 1963

To the Honorable Judges of Said Court:

I, Elmore Whitehurst, Referee in Bankruptcy, before whom the above cases are pending respectfully certify that in the course of said proceedings I made an order on June 4, 1963, denying claims of the bankrupts to certain tax refunds. On June 12, 1963, within the time authorized by law the bankrupts filed a petition for review of the order and paid the required filing fee of $10.

[fol. 3] Accordingly, I do hereby certify the following, attached hereto:

1. Question Presented.

2. Findings of Fact.

3. Conclusion of Law.

4. Opinion of Referee.

5. Claim of Gerald Segal to tax refund.

6. Alternative claim of Freida Segal, wife of Gerald Segal, to tax refund.

7. Claim of Sam Segal to tax refund.

8. Alternative claim of the estate of Dennie Segal, deceased wife of Sam Segal, to tax refund.

9. Trustee's objections to applications of bankrupts for recovery of tax refunds.

10. Stipulation.

11. Order denying claim of bankrupts to tax refund, signed and entered June 4, 1963. This is the order sought to be reviewed.

12. Petition for Review.

[fol. 4] Dated at Dallas, Texas, this 18th day of June, 1963.

Elmore Whitehurst, Referee in Bankruptcy.

1. *Question Presented*

Whether the bankrupts are entitled to income tax refunds for losses incurred during the year in which the petition in bankruptcy was filed or such refunds are assets of the bankrupt estates.

2. *Findings of Fact*

Gerald Segal, individually and doing business as Segal Cotton Products, No. 4951, Sam Segal, individually and doing business as Segal Cotton Products, No. 4952, and Segal Cotton Products, a partnership composed of Gerald Segal and Sam Segal, No. 4953, all filed voluntary petitions in bankruptcy in this court on September 27, 1961.

William J. Rochelle, Jr., was appointed trustee in bankruptcy in all three proceedings and duly qualified.

During the year 1961, prior to the filing of the petition on September 21, Segal Cotton Products incurred losses, as a result of which the trustee filed claims for carry back adjustments with the Internal Revenue Service and secured certain tax refunds.

Claims to these refunds were filed by the bankrupt, Gerald Segal and his wife, Freida, and by the bankrupt, [fol. 5] Sam Segal and the estate of his deceased wife, Dennie Segal, which claims were opposed by the trustee.

Alternative claims to one-half of the refunds were made by the wife of Gerald Segal and the estate of the deceased wife of Sam Segal. The alternative claims were disallowed and have not been pursued on this petition for review.

Additional facts necessary or helpful to the determination of the legal question involved in this review are contained in a stipulation with attached exhibits signed by the trustee

and the attorney for the claimants, and filed in this court on June 4, 1963. The stipulation, which is attached to this certificate, is found by the court correctly to state the facts and is adopted as part of its findings of fact.

After a hearing, and consideration of the stipulation, an order denying the bankrupts' claims was entered on June 4. This is the order sought to be reviewed.

3. *Conclusion of Law*

Claimants are not entitled to the tax refunds but they are assets of the bankrupt estates.

4. *Opinion of Referee*

Section 70a of the Bankruptcy Act provides in part:

> "The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act * * * to [fol. 6] all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * * ."

In the case of *In re Sussman,* 289 F. 2d 76 (3d Cir. 1961), the United States Court of Appeals for the Third Circuit held that a tax refund which was paid because of losses sustained during the year in which the bankruptcy petition was filed went to the bankrupt and not to the trustee. The court pointed out that there is no provision in law that bankruptcy terminates a taxable year, and said that therefore "when Sussman filed his bankruptcy petition he had

no 'right of action' against the United States for the trustee to acquire under Section 70, sub. a(5) or (6)." The court found that this was a contingent claim against the United States which the court said could not be assigned.

The court conceded that the "unfortunate result" of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:

> "The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions [fol. 7] of Section 70, sub. a have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution."

The facts in the case at bar cannot, in my opinion, be distinguished from those of the *Sussman* case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. But *Sussman* has been severely criticized. I am persuaded by the arguments advanced against it that *Sussman* was incorrectly decided. Therefore, I have declined to follow it and have ruled that these refunds are assets of the bankrupt estates.

The articles to which I have reference are: "Property Which Passes to a Trustee—A Critical Analysis of In Re Sussman" in "Bankruptcy Law—Modern Trends" by Referee Asa S. Herzog of the Southern District of New York, 36 Journal of the National Association of Referees in Bankruptcy, page 18, and "Windfall for Bankrupts: Loss Carryback Claims Do Not Vest in Trustee" originally appearing in the Stanford Law Review and reprinted by permission in 36 Journal of the National Association of Referees in Bankruptcy, page 116. Marked copies of the issues of the Journal containing these articles are attached to this certificate, and I shall not undertake to repeat what they say.

I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser* v. *Tucker,* 26 S. W. 1044, 1045; *Wheeler* v. *Riviera,* 49 S. W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a [fol. 8] (5) of the Bankruptcy Act unless they were non assignable by reason of being claims against the United States. The Court of Appeals thought that they were non assignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decisions to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin* v. *United States,* 97 U. S. 392, 397, and *National Bank* v. *Downie,* 218 U. S. 345.

It seems clear that section 72 of the Bankruptcy Act does not require or even permit the inequitable result which the Court of Appeals ascribed to it while deploring the result.

In the Matter of Gerald Segal Bankrupt No. 4951

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes Gerald Segal, bankrupt herein, and files this application for the recovery of tax refunds which are now in possession of William J. Rochelle, Jr., receiver in the above matter, and says:

1.

That the receiver has recovered the sum of $1,608.21 for the year 1959, and the sum of $283.07 for the year 1960, [fol. 9] and that as a matter of law this bankrupt is entitled to said money, and that the receiver has failed and refused to pay same to this applicant, and applicant says

that this Court should in all things order the payment by the receiver of said sums.

Wherefore, Premises Considered, applicant prays that this Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to this applicant.

Henry Klepak, Attorney for Applicant, 1509 Mercantile Bank Bldg., Dallas 1, Texas, R12-9013.

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes Freida Segal, wife of Gerald Segal, and files this her application for the recovery of tax refunds and says:

1.

That in the event should the Court rule against the ap- [fol. 10] plication of Gerald Segal for the recovery of the tax refunds for the years 1959 and 1960, which is in the hands of the receiver, William J. Rochelle, Jr., in that event only, applicant would show that said funds constitute community property and funds and that she was not a bankrupt and that one half of said funds as a matter of law would constitute funds belonging to her and says this Court should set a day certain for the receiver to appear and show cause why, if the Court should not pay said funds to Gerald Segal, why one half of said tax refund should not be paid to this applicant.

Wherefore, Premises Considered, applicant prays that the Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to applicant, in the event the tax refunds are not paid to Gerald Segal.

Henry Klepak, Attorney for Applicant, 1509 Mercantile Bk. Bldg., Dallas 1, Texas, R12-9013.

[fol. 11]

In the Matter of Sam Segal Bankrupt No. 4952

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes Sam Segal, bankrupt herein, and files this application for the recovery of tax refunds which are now in possession of William J. Rochelle, Jr., receiver in the above matter, and says:

1.

That the receiver has recovered the sum of $1,839.41 for the year 1959 and the sum of $505.63 for the year 1960, and that as a matter of law this bankrupt is entitled to said money and that the receiver has failed and refused to pay same to this applicant, and applicant says that this Court should in all things order the payment by the receiver of said sums.

Wherefore, Premises Considered, applicant prays that this Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to this applicant.

Henry Klepak, Attorney for Applicant, 1509 Mercantile Bank Bldg., Dallas 1, Texas, R12-9013.

[fol. 12]

Filed: April 2, 1963

To the Honorable Judge of Said Court:

Now comes the Estate of Dennie Segal, deceased wife of Sam Segal, and files this application for the recovery of tax refunds and says:

1.

That in the event should the Court rule against the application of Sam Segal for the recovery of the tax refunds

for the years 1959 and 1960 which money is in the hands of the receiver, William J. Rochelle, Jr., in that event only, applicant would show that said funds constitute community funds and that the estate is entitled to said funds; that the wife of Sam Segal was not a bankrupt and that one half of said funds as a matter of law would constitute funds belonging to her and says that this Court should set a day certain for the receiver to appear and show cause why, if the Court should not pay said funds to Sam Segal, why one half of said tax refund should not be paid to the Estate of Dennie Segal.

Wherefore, Premises Considered, applicant prays that the Court set a day certain for a hearing, and that notice be issued to the receiver to appear and show cause why said money should not be paid to the Estate of Dennie [fol. 13] Segal in the event the tax refunds are not paid to Sam Segal.

Henry Klepak, Attorney for Estate of Dennie Segal, 1509 Mercantile Bank Bldg., Dallas 1, Texas, R12-9013.

TRUSTEE'S OBJECTIONS TO APPLICATIONS OF BANKRUPTS FOR RECOVERY OF TAX REFUNDS

Nos. 4951 and 4952

Filed: April 19, 1963

To the Honorable Elmore Whitehurst, Referee in Bankruptcy:

Comes now William J. Rochelle, Jr., duly appointed qualified and acting Trustee in the above entitled and numbered matters and would respectfully file this his objections to the applications previously filed herein on behalf of the Bankrupts for the recovery of certain tax refunds and in support thereof would respectively show:

[fol. 14]

I.

Your Trustee denies, that as a matter of fact or as a matter of law, the Bankrupts are entitled to any funds received by the Trustee as a result of tax loss carryback claims of the Bankrupts.

II.

The Trustee denies that, as a matter of fact or as a matter of law, that the wives of the said Bankrupts are entitled to any portion of said refunds even if said refunds should constitute community property of said Bankrupts and their wives since all community property of the Bankrupts are subject to administration by this Court and are, as a matter of law, subject to the debts of the Bankrupts.

Wherefore, your Trustee prays that the applications of the Bankrupts herein be in all things denied.

Wm. J. Rochelle, Jr., Trustee .

A copy of the foregoing objections were this 18th day of April, 1963, mailed to the Honorable Henry Klepak, 1509 Mercantile Bank Building, Dallas, Texas, Attorney for the Bankrupts.

Wm. J. Rochelle, Jr.

[fol. 15]

STIPULATION

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

In Bankruptcy

In the Matters of

GERALD SEGAL, individually and doing business as SEGAL COTTON PRODUCTS

No. 4951

SAM SEGAL, individually and doing business as SEGAL COTTON PRODUCTS

No. 4952

and

SEGAL COTTON PRODUCTS, a partnership composed of GERALD SEGAL and SAM SEGAL

No. 4953

Bankrupts

Filed: June 4, 1963

It Is Stipulated and Agreed by and between the trustee, William J. Rochelle, Jr., and Henry Klepak, attorney for Gerald and Freida Segal, and Sam and Denie Segal, as follows:

On September 27, 1961, a voluntary bankruptcy petition was filed on behalf of Gerald Segal and Sam Segal, co-partners, trading under the firm name of Segal Cotton Products. On the same date a voluntary bankruptcy petition [fol. 16] was filed on behalf of Sam Segal, individually, and Gerald Segal, individually. Neither Freida Segal nor Denie Segal, wives of the bankrupts, were adjudicated bankrupts. Both bankrupts and their wives were at all

times material, residents of the State of Texas, and none of the property in controversy herein is the separate property of either of said wives, but all said property is community property.

By agreement between the trustee and the attorney for the bankrupts, the firm of LaFrance, Walker, Jackley & Saville, Certified Public Accountants, of Dallas, Texas, were employed to prepare and file applications for carry-back adjustment. Exhibits 1 through 6, each on U. S. Treasury Department, Internal Revenue Service Form 843, are copies of the claims for refund prepared by said accountants and filed by said bankrupts and their wives, which claims were supported by Exhibits 7, 8 and 9, being the income tax returns for the calendar year 1961 for the individuals and the partnership, Segal Cotton Products. Exhibits 10, 11, 12 and 13 are Notices of Adjustment, U. S. Treasury Form 1331, which issued as a result of said loss carry-back claims. As a result of said claims for refunds the trustee received the following refund checks on the following claims for the following calendar years:

Gerald and Freida Segal, net Operating Loss for 1961, carry-back to 1960	$ 283.07
Gerald and Freida Segal, net Operating Loss for 1961, carry-back to 1959	1,608.21
Sam and Denie Segal, net Operating Loss for 1961, carry-back to 1960	505.63
Sam and Denie Segal, net Operating Loss for 1961, carry-back to 1959	1,839.41

[fol. 17] These funds, by agreement with the attorney for the bankrupts, were deposited in the trustee's bank account to be held by him in escrow pending final determination by this court of the rights of the parties thereto.

By agreement with the attorney for the bankrupt, trustee paid the sum of $1,059.08 to said accountants for their services in obtaining the refund.

The losses giving rise to the refund were incurred by the partnership, Segal Cotton Products and, as shown by Exhibits 7, 8 and 9, the net losses carried back were arrived at by deducting from the partnership losses which were incurred between the period of January 1, 1961 to September 27, 1961, the income of the individual bankrupts earned during the calendar year 1961 from sources other than the partnership, Segal Cotton Products. The various claims for refund, Exhibits 1 through 6, were therefore predicated and based on the entire calendar year 1961.

Dated this 8th day of May, 1963.

Wm. J. Rochelle, Jr., Trustee in Bankruptcy.

Henry Klepak, Attorney for Bankrupts.

[fol. 18]

ORDER DENYING CLAIM OF BANKRUPTS TO TAX REFUND

The Trustee herein having received certain funds from the United States Treasurer as a result of loss-carryback claims which claims were allowed and paid, and the individual bankrupts herein, Sam Segal and Gerald Segal, having made application for the recovery of said tax refunds on the grounds that the right thereto or the rights thereto accrued after the date of bankruptcy, and in the alternative that the wives of said bankrupts were entitled to one-half of the said funds, since the refunds were the community property of the bankrupts and their wives, and the bankrupts having appeared through their attorney, and the Trustee having appeared in person, and said attorney and the Trustee having submitted the matter on a stipulation of the facts duly filed herein, and the Court having considered the pleadings, the stipulation, the remarks of counsel and the applicable law and being of the opinion that said application should be denied; it is therefore

Ordered that the applications of the bankrupts for recovery of the tax refunds and in the alternative for recov-

ery on behalf of their wives of one-half of the tax refunds be and the same are hereby in all things denied.

Signed this 4 day of June, 1963.

Elmore Whitehurst, Referee in Bankruptcy.

[fol. 19]

PETITION FOR REVIEW

Filed: June 12, 1963

To the Honorable Judge of Said Court:

On the 4th day of June, 1963 the Referee in Bankruptcy in the above styled and numbered cause entered an order denying the claim of the bankrupts, petitioners herein, Gerald Segal, Sam Segal, and Segal Cotton Products, to a tax refund to which the bankrupts claimed that they were entitled as a result of loss-carryback claims which had been paid. The order reads as follows:

Order Denying Claim of Bankrupts to Tax Refund

"The Trustee herein having received certain funds from the United States Treasurer as a result of loss-carryback claims which claims were allowed and paid, and the individual bankrupts herein, Sam Segal and Gerald Segal, having made application for the recovery of said tax refunds on the grounds that the right thereto or the rights thereto accrued after the date of bankruptcy, and in the alternative that the wives of said bankrupts were entitled to one-half of the said funds, since the refunds were the community property of the bankrupts and their wives, and the bankrupts having appeared through their attorney, and the Trustee hav-[fol. 20] ing appeared in person, and said attorney and the Trustee having submitted the matter on a stipulation of the facts duly filed herein, and the Court having considered the pleadings, the stipulation, the re-

marks of counsel and the applicable law and being of the opinion that said application should be denied; it is therefore

Ordered that the applications of the bankrupts for recovery of the tax refunds and in the alternative for recovery on behalf of their wives of one-half of the tax refunds be and the same are hereby in all things denied.

Signed this 4th day of June, 1963.

Elmore Whitehurst, Referee in Bankruptcy.

Point of Error

Petitioners seek a review of the above order for the reason that same is wholly without basis in law. Petitioners would show that the Referee in entering such order erred in determining on the facts recited in that order that the Trustee, as opposed to the bankrupts, was entitled to the loss-carryback which had been paid.

Argument

This case presents an analogous if not identical fact situation as an earlier case decided by the Court of Appeals of the Third Circuit, *In Re: Susman,* 289 F2d, 77 (1961). As in [fol. 21] that case this case turns upon an interpretation of Section 70, Sub. a of the Bankruptcy Act. That section provides, in relevant part, as follows:

"(a) The Trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against

him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * *."

It was petitioner's position before the Referee, and it is your petitioner's position on review that the loss-carryback funds which were paid were not paid as a result of a right of action which existed at the time of bankruptcy. On September 27th, 1961 a voluntary bankruptcy petition was filed in the petitioner's behalf. It will be noted that the funds paid on the loss-carryback claim were paid on a claim based on the entire calendar year of 1961 and not merely on that period of time that proceeded the date on which the bankruptcy petition was filed. The right itself did not come into existence until the end of the taxable year and until that time such claim was uncertain and undeterminable as to amount, and more importantly, as to its existence for the reason that the bare existence of such [fol. 22] claim was not certain until the end of the taxable year of 1961 and could be no theory on which the Referee could have relied to say such claim asserted at the end of that taxable year was a "contingent claim" as of the date of bankruptcy.

Section 70, Sub a(5) refers to "title" of "property". This concept of title and property connotes an ownership interest in some Res. Here there can be no existing fund to which the Trustee of the estate of the bankrupt, or the Referee by his order, could point to as of September 27th, 1961. Therefore this concept of title to property is not involved in this case.

The conclusion is inescapable that in September of 1961 petitioners had no right of action against the United States and no vested or transferable property in an anticipated claim against the United States within the meaning of Section 70 Sub a of the Bankruptcy Act.

Because this may result in some inequitable windfall to the bankrupts cannot be a basis for the entrance of the

order for which purpose this review is petitioned. If Section 70 Sub a is incapable of rendering the result desired by the Reference only legislation should be allowed to remedy the legislative defect.

Wherefore, Premises Considered, petitioners pray that the order entered by the Referee in Bankruptcy as set out herein be reversed and that the Referee in Bankruptcy is [fol. 23] instructed to enter an order instructing the receiver to pay the proceeds claimed by the petitioners.

Respectfully submitted,

Henry Klepak, Attorney for Petitioners, 1509 Mercantile Bank Bldg., Dallas 1, Texas.

The State of Texas
County of Dallas

Before Me, the undersigned authority, on this day personally appeared Henry Klepak, attorney for the petitioners in the above styled and numbered causes, who states upon oath that the facts and statements as set out therein were related to him by the petitioners and that same are true and correct to the best of his knowledge and belief.

Henry Klepak

Sworn to and Subscribed before me on this 10th day of June, 1963, to certify which witness my hand and seal of office.

Gladys Cobb, Notary Public, Dallas County, Texas.

(Seal)

[fol. 24]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

OPINION OF THE COURT—Filed August 26, 1963

The controversy in this case grows out of a Certificate of Review to this court by Honorable Elmore Whitehurst, Referee in Bankruptcy at Dallas, Texas.

The question presented, in short, is, "Does a carryback tax item under Title 26, 172 of the Revised Annotated Statutes belong to the Trustee for the benefit of creditors, or does it go to the bankrupt?

The Referee held that it belonged to the Trustee, notwithstanding the opinion in the *Sussman* case in the Third Circuit, 289 F. 2d 76. We adopt in part the Certificate of the Referee and the quotations there made by him as follows:

> "In the Sussman case the court conceded that the 'unfortunate result' of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:
>
> > 'The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a, have inequitable consequences in this very special situation. But we [fol. 25] cannot correct this. Such a matter requires a legislative solution.'
>
> "The facts in the case at bar cannot, in my opinion, be distinguished from those of the Sussman case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. * * * I am persuaded by the arguments advanced against it that Sussman was incorrectly decided.

Therefore, I have declined to follow it, and have ruled that these refunds are assets of the bankrupt estates. * * *"

The Referee continues:

"I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser* v. *Tucker,* 26 S. W. 1044, 1045; *Wheeler* v. *Riviera,* 49 S. W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a (5) of the Bankruptcy Act unless they were non-assignable by reason of being claims against the United States. The Court of Appeals thought that they were non-assignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decision to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin* v. *United States,* 97 U. S. 392, and *National Bank* v. *Downie,* 218 U. S. 345."

Our view of the case is that of the Referee. Indeed, Judge Hastie, in the closing words of his opinion in the Sussman case, manifestly felt that the strict interpretation of the [fol. 26] statute, as he viewed it, tended to smother the spirit of the law and to stand aside the urging of the principles of equity and fair play. We agree with Judge Hastie that the opinion does result in an injustice to the creditors. We think there is a better way of solving the problem.

Justice Cardozo in *Martin* v. *National Surety Co. et al.,* 300 U. S. 588, leaves open the door for a more satisfactory light upon the question:

"* * * the statute must be interpreted in the light of its purpose * * *. An assignment ineffective at law may none the less amount to the creation of an equitable lien * * *. It would be a strange construction of

the statute that would make it necessary for the Government to declare the equities illusory when they serve its own good."

The syllabus in the Martin case, Section 2 thereof, clearly sums up the effect of the decision:

"2. The provisions of R. S., §3477; 31 U.S.C. 203, declaring all assignments of any claim upon the United States 'absolutely null and void' unless made after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, are provisions for the protection of the Government, and not for the regulation of the equities of claimants growing out of regular assignments, when collection is complete and the Government's liability ended. P. 594."

[fol. 27] The court in this case says in the Opinion:

"We conclude that Martin's interest in the fund was correctly held to be subordinate to the interests of other claimants."

The Sussman decision, which is in conflict with the Referee's holding, we find is ably discussed and criticized in the Journal of the National Association of Referees in Bankruptcy, issue of October 1962, page 116, from which we quote:

"The admittedly inequitable consequences of the Sussman decision resulted from an incorrect application of section 70 (a).

"The court reasoned that the carryback claim could not be an existing property interest at the time the petition was filed because section 172 of the Internal Revenue Code bases carryback refunds upon net operating losses for the taxable year. The bankrupt could not have presented his claim until nearly seven months

after his petition was filed. However, his inability to present his claim when the petition was filed should not, in itself, prevent the claim from vesting in the trustee, for it is possible to have an existing interest in property without having an immediate right to enjoy that property. For example, one who holds a note payable at the end of the year has an existing property interest even though he has no immediate right to collect the debt. * * *"

[fol. 28] "The Sussman court's conclusion that the right itself did not come into existence until the end of the taxable year must have been based upon the uncertainty of the claim rather than its immaturity, for the court assumed that the bankrupt could possibly earn enough during the remainder of the year to offset his losses and eliminate the availability of a carryback. Several cases involving claims of far greater uncertainty make it clear that a contingent claim can vest in the trustee. In the leading case of *Williams* v. *Heard* the bankrupt's award for losses caused by the activities of British-built Confederate cruisers was held to have vested in the trustee even though the bankrupt had no enforceable claim at the time of bankruptcy and it seemed unlikely that he ever would have such a claim. The Court reasoned that the bankrupt did have a right to compensation at the time he was adjudicated a bankrupt even though he then had no remedy. In determining that this particular inchoate claim was sufficiently in existence to vest in the trustee the court relied upon the test laid down by Justice Story in *Comegy* v. *Vasse*. * * * If the Sussman court had applied this test, it would have found that the carryback claim was an existing property interest; for, if the bankrupt had died at the time the petition was filed, it is clear that his administrator could have claimed the refund for the benefit of the estate."

"The Sussman court further reasoned that, even if the claim was an existing property interest, it was not

the type of interest which can be transferred or levied [fol. 29] upon, as required for it to vest in the trustee under section 70(a) (5) of the Bankruptcy Act, because the Federal Anti-Assignment Statute forbids the assignment of unallowed claims against the government. However, the Supreme Court decided in *Erwin* v. *United States* that the Anti-Assignment Statute does not prevent such claims from vesting in the trustee in bankruptcy."

The author of the article in the magazine cites authorities thus:

"An immature carryback claim was held to be assignable under ch. XI arrangement proceedings in the case of *In re Kepp Elec. & Mfg. Co.*, 98 F. Supp. 51 (D. Minn. 1951). The debtor assigned all his claims for tax refunds to a receiver for the benefit of the unsecured general creditors. * * * There is no apparent reason why a claim which is sufficiently in existence to be assignable under ch. XI proceedings should not be sufficiently in existence to vest in the trustee under § 70 (a)."

"Since the Sussman case arose in Pennsylvania it may be significant that the Pennsylvania courts have held that contingent remainders are subject to execution and do vest in the remainderman's trustee in bankruptcy. E. G., *In re Packer's Estate*, 246 Pa. 116, 92 Atl. 70 (1914) (bankruptcy); *De Haas* v. *Bunn*, 2 Pa. 335 (1845) (execution). In the *Dorgan* case, (237 Fed. 507), supra, the court said: 'Such interest is a property right—contingent, it is true, as to the amount and [fol. 30] value thereof, and subject to be entirely defeated, but nevertheless a property right . . . The trustee, or purchaser from him, simply stands in the shoes of the bankrupt, receiving something, or possibly nothing, ultimately; but it is a right which should have a value, and, having a value, under the policy of the law, in case of bankruptcy, it passes to the trustee for the

benefit of creditors. *The whole policy of the Bankrupt Act is that all nonexempt property of the bankrupt . . . shall be subjected to the payment of the debts of the bankrupt.'* 237 Fed. at 509. (Emphasis added.)"

The general purpose and policy of the Bankruptcy Act, from its incipiency has been, and is that all property of the bankrupt shall be subject to the payment of his debts. As suggested by the authorities quoted, had the bankrupt died solvent, his legal representative should and would have listed his claim and collected it. Nowhere else could the fund have gone except to his estate, if he had been solvent. Since he is insolvent, it must go to his creditors.

T. Whitfield Davidson, United States District Judge.

[fol. 31]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

ORDER AFFIRMING REFEREE ON PETITION TO REVIEW—Filed August 27, 1963

The Referee in Bankruptcy in the above styled and numbered matters having entered an order on the 4th day of June, 1963, denying the claim of the above named bankrupts that they were entitled to the proceeds of a tax refund resulting from loss carry-back claims paid by the Director of Internal Revenue, and said bankrupts having duly and timely filed their petitions to review said order, and the Referee in Bankruptcy having filed his certificate on review, including his Findings of Fact, Conclusions of Law and Opinion, and the Court having considered said petition and certificate, and being of the opinion that said order should be in all things affirmed and approved, it is therefore

Ordered, Adjudged and Decreed that the order of the Referee in Bankruptcy entered the 4th day of June, 1963,

denying the claim of the above named bankrupts to the proceeds of said loss carryback claims be and the same is hereby in all things affirmed and approved in accordance with the opinion of the Court heretofore rendered and filed.

Signed this 27 day of August, 1963.

T. Whitfield Davidson, United States District Judge.

[fol. 32]

In the United States District Court

For the Northern District of Texas

Dallas Division

In the Matter of

Gerald Segal, Individual) and d/b/a Segal Cotton Products

No. 4951

Sam Segal, Individually and d/b/a Segal Cotton Products

No. 4952

and

Segal Cotton Products, A Partnership Composed of Gerald Segal and Sam Segal, Bankrupts

No. 4953

Notice of Appeal—Filed September 25, 1963

Notice is hereby given that Gerald Segal, individually and doing business as Segal Cotton Products, Sam Segal, individually and doing business as Segal Cotton Products, and Segal Cotton Products, a partnership, hereby appeal to the United States Court of Civil Appeals for the Fifth Circuit, from the order affirming Referee in Bankruptcy on Petition for Review in the matters of Gerald Segal, Indi-

vidually and doing business as Segal Cotton Products, No. 4951, Sam Segal, Individually and doing business as Segal Cotton Products, No. 4952, and Segal Cotton Products, a partnership No. 4953, entered on the 27th day of August, [fol. 33] 1963 by the United States District Court for the Northern District of Texas, Dallas Division.

Henry Klepak, Attorney for Appellants, Gerald Segal, Sam Segal and Segal Cotton Products, Bankrupts, 1509 Mercantile Bank Building, Dallas 1, Texas.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

BOND FOR COSTS ON APPEAL—Filed September 25, 1963

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to William J. Rochelle, Jr., Trustee, the sum of Two Hundred Fifty ($250.00) Dollars.

The condition of this bond is that, whereas the Bankrupts have appealed to the Court of Appeals for the Fifth Circuit by notice of appeal filed day of September, 1963, from an order affirming Referee in Bankruptcy on Petition for Review entered on the 27th day of August, 1963, if the bankrupts shall pay all costs adjudged against them if the appeal is dismissed or the order affirmed or such costs as the appellate court may award if the order is modified, then this bond is to be void, but if the bankrupts fail [fol. 34] to perform this condition, payment of the amount of this bond shall be due forthwith.

Gerald Segal and Sam Segal, Individually and doing business as Segal Cotton Products.

(Illegible), Attorney, Lawyers Surety Corporation.

E. M. Austin, Atty.-in-Fact, Surety.

Lawyers Surety Corporation
10th Floor
Fidelity Union Tower
Dallas 1, Texas

Bond No. 114971

(Seal)

Signed and acknowledged before me this day of , 1963.

[fol. 35]

Law Offices
Henry Klepak
15th Floor, Mercantile Bank Bldg.
Dallas 1, Texas

September 26, 1963

Associates:
Thomas F. Nash
Jack Stuart Cole
Norman A. Zable

RIverside 2-9013

Filed: Sept. 27, 1963

United States District Clerk
United States Post Office
Bryan and Ervay
Dallas, Texas

Attention Miss Hamilton

Re: In the Matters of Gerald Segal Et Al, Nos. 4951, 4952, 4953

Dear Miss Hamilton:

Please prepare for us a Statement of Facts to be filed in the above matter, and include in the statement the following statements:

1. Application of bankrupts for recovery of tax refunds.

[fol. 36]

2. Trustee's objections to application of bankrupts.
3. Stipulation of Facts
4. Referee's Order denying claim of bankrupts
5. Petition for Review
6. Certificate of Review
7. Opinion of Court (on review)
8. Order affirming Referee on Petition to Review
9. Notice of Appeal
10. Bond for costs on appeal

Your attention to this request will be greatly appreciated.

Very truly yours,

Henry Klepak

HK/g

[fol. 37]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21043

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, *et al.*,

—versus—

WILLIAM J. ROCHELLE, JR., Trustee.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION
—April 14, 1964

On this day this cause was called, and after argument by Henry Klepak, Esq., for appellant, and William J. Rochelle, Jr., Esq., for appellee, was submitted to the Court.

[fol. 38]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21043

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al., Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee, Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before Rives, Bell and Wright,* Circuit Judges.

OPINION—September 9, 1964

BELL, Circuit Judge: This appeal presents a question of prime importance in the administration of the Bankruptcy Act. At issue is whether loss-carryback refunds forthcoming under the federal income tax statutes[1] and arising from losses sustained prior to but in the year of bankruptcy go to creditors or the bankrupt.

[fol. 39] Gerald Segal and Sam Segal, as individuals, filed voluntary petitions in bankruptcy on September 27, 1961. On the same date Segal Cotton Products, a partnership composed of Gerald Segal and Sam Segal, filed a voluntary petition in bankruptcy. The trustee here was duly appointed and qualified in all three proceedings.

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* Of the D. C. Circuit, sitting by designation.

[1] § 172 of the Internal Revenue Code of 1954, 26 USCA, § 172.

Segal Cotton Products incurred losses during the year 1961 prior to the filing of the petition on September 21. The trustee filed claims for loss-carryback adjustments with the Internal Revenue Service in light of income taxes having been paid by the individual partners for the two preceding years. Tax refunds were obtained pursuant thereto, and these were the subject matter of claims filed on behalf of Gerald and Sam Segal which were denied by the Referee.[2] The District Court affirmed, holding that the refunds were assets of the trustee for the benefit of creditors. This holding was contrary to that of the Third Circuit, on similar facts, in the case of *In re Sussman*, 3 Cir., 1961, 289 F.2d 77, and that of the First Circuit in *Fournier* v. *Rosenblum*, 1 Cir., 1963, 318 F.2d 525. This appeal followed.

The question presented is whether the rights to the loss-carryback adjustments passed to the trustee. The bankrupts contend that the rights accrued after the date of bankruptcy since applications for refunds, resting as they must on [fol. 40] the results of the whole taxable year, could not have been filed until the end of the year. The answer depends on whether such a right to refund or adjustment is transferable property within the meaning of § 70a(5) of the Bankruptcy Act, 11 USCA, § 110a(5), in pertinent part as follows:

> "(a) The Trustee of the estate of a bankrupt . . . shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by

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[2] The refunds to Gerald Segal were in the amounts of $283.07 on the 1961 loss-carryback to 1960, and $1,608.21 to 1959. The refunds to Sam Segal were in the amount of $505.63 to 1960, and $1,839.41 to 1959.

> any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: . . . "

It is to be noted that the term "property" as used in this section includes rights of action which could have been transferred prior to the filing of the petition.[3] The court held in *Sussman, supra,* that the right to a loss-carryback adjustment is not property as defined in § 70a; and further, if property, because of the proscription contained in the Assignment of Claims Act, 31 USCA, § 203, it could not have been transferred prior to the filing of the petition [fol. 41] in bankruptcy. In *Fournier* v. *Rosenblum, supra,* the court went only so far as to hold that the right was not embraced in the concept of property as used in § 70a. With deference, and after careful consideration of the reasoning of these respected sister courts, we find ourselves unable to follow their decisions. We hold that the right to a loss-carryback refund or adjustment, although contingent as to amount, is transferable property within the meaning of § 70a(5), and affirm.

We begin with the proposition that it was the intent of Congress to secure to creditors all property of a bankrupt. The refunds here in question will pass to the bankrupts freed from claims of their creditors if such a right is outside the scope of the definition of property as used in the Act. This will be the result in spite of the fact that the refunds arose as a result of losses in the partnership business which in the first place caused the claims of the creditors to come into existence. This windfall to the bankrupts at the expense of the creditors was recognized by the court in *Sussman,* and *Fournier* v. *Rosenblum,* but each court felt that it was a matter which required legislative correction.

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[3] The statute also includes rights of action which could have been levied upon and sold under judicial process, or otherwise seized, impounded or sequestered. In the view we take of the case, any consideration of these qualifications is pretermitted.

Our conclusion stems from a construction which gives effect to the congressional intent. It is true that the refunds flow from newly created rights in the sense that the loss-carryback provision came into the law in 1942, after the enactment of § 70a(5) in 1898. Moreover, such refunds may not be sought until the end of the taxable year in which the [fol. 42] losses arise, and thus the realization of the right is not only deferred but a contingency is posed as to the amount of the loss since conceivably the applicable losses may be reduced or increased after the date of the filing of the petition in bankruptcy.

There is nothing in the language of the statute to indicate that the scope of the definition of property is to be limited to property rights existing when the statute was enacted. This conclusion must be coupled with the fact that the concept of property as used in the Bankruptcy law has been held, over a long period of years, to include rights depending on contingencies. In *William* v. *Heard,* 1891, 140 U.S. 529, 11 S.Ct. 885, 35 L.Ed. 550, the predecessor bankruptcy statute provided that all of the "estate, debts, and effects" of the bankrupt were to be recovered for the creditors. This was said to embrace his whole property. The facts were that during the Civil War the bankrupts had paid extra insurance premiums to cover war risks created by Confederate ships sponsored by Great Britain. In 1871, the United States secured an international reparations award of 15 million from Great Britain to be distributed by Congress as it saw fit. Congress set up a commission to determine distribution of the fund in 1874, and the bankruptcy occurred in 1875. No steps were taken to recover an award for the extra premiums paid until 1882 when Congress expressly provided for such recovery, and the award was made in 1886. The question was presented of ownership of the award as between the assignee of the bankrupts and them individually, they having been dis-[fol. 43] charged in 1877.[4] The court held that the bank-

[4] Under the bankruptcy practice then in effect the bankrupts were required to make a conveyance of "all [their] estate, real

rupts had at the time of bankruptcy a possibility, coupled with an interest, of recovering the premiums, and that such was property within the meaning of the Act which had passed to the assignee of the bankrupts.

The case of *In re Dorgan's Estate,* S.D., Iowa, 1916, 237 Fed. 507 involved an Iowa will giving the residue to the wife for life, with "full power to use the same . . . as she may see fit," and at the wife's death, remainder to bankrupt of "all the proceeds . . . left." The petition in bankruptcy was filed during the lifetime of the wife. Under Iowa law, this will created a life estate in the wife, with a vested remainder, subject to divestment, in the bankrupt. The court held that the bankrupt's interest passed to the trustee, saying "Such interest is a property right—contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life."

The case of *Kleinschmidt* v. *Schroeter,* 9 Cir., 1938, 94 F.2d 707, presented a situation where the bankrupt was engaged in a joint mining venture, advanced part of his contribution to the venture, but defaulted on the rest. Under the joint venture agreement he thereby forfeited all [fol. 44] interest in the venture, except the conditional right to a return of his prior contribution if the venture made a profit or was sold at a profit. The court held that the conditional right of the bankrupt to a return of his contribution passed to the trustee in bankruptcy by operation of § 70a.

See also *Chandler* v. *Nathans,* 3 Cir., 1925, 6 F.2d 725, which based the passing of an income tax refund claim pending when the bankruptcy petition was filed on the premise that it was a right of action arising from the un-

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and personal" to an assignee. This is to be compared with the present practice of all property of the bankrupt passing by operation of law to the trustee.

lawful taking or detention of property of the bankrupt within the meaning of § 70a(6) of the Act. And *cf. In re Kepp Elec. & Mfg. Corp.*, D. Minn., 1951, 98 F.Supp. 51, a Chapter XI arrangement proceeding, where the debtor transferred various assets to a receiver, including all tax refunds due and owing the debtor from the United States government. The assignment of loss-carryback claims was prior to the end of the taxable year. The Commissioner of Internal Revenue maintained that the transfer of the refund claim was void as violating the Assignment of Claims Act. It was held that this Act did not apply to assignments which occur through operation of law, and that a Chapter XI transfer to a receiver occurs by operation of law. Apparently no question was presented as to whether the assignment might be invalid because of its being contingent, and there was no contest between the receiver and an assignee as distinguished from the government.

Thus it is that these authorities have considered contingent rights as property under the Bankruptcy Act. They [fol. 45] are applicable and persuasive by analogy. We hold that the right to claim loss-carryback refunds under the circumstances of this case is property as that term is used in § 70a(5), notwithstanding that the claim is subject to adjustment in the event the taxpayer has other losses or earnings during the balance of the year, and the claim may not be filed until the end of the taxable year.[5] This right of action springs from and rests on the fact that the income taxes theretofore paid were paid subject to adjustment in the event of future losses, and are available for

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[5] A proration of the refund in the ratio of the losses before and after the filing date would be indicated in the event of losses after the filing date. Earnings after the filing date would simply reduce the amount of the refund to the trustee. The fact that the refund claim is unmatured, in the sense that the taxpayer may not file for it until the end of the taxable year, would not appear to prevent the claim from being "property" within § 70a(5). This is an everyday occurrence where notes due and accounts receivable at a future date pass to the trustee in bankruptcy.

that purpose to the end of providing the refund. The right to adjustment is definite; the time for filing the claim is definite; only the amount of the refund is contingent and this meets the test of a possibility vested with an interest set out in *Williams* v. *Heard, supra.*[6]

Accepting that the inchoate right to the loss-carryback refund is "property", this leaves for decision whether it [fol. 46] is property which the bankrupt "could by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. It is not contended that the contingent and defeasible nature of the refund claim prevents it from being transferable. Contingent property interests are, of course, assignable at common law. *In re Landis,* 7 Cir., 1930, 41 F.2d 700; *In re Wright,* 2 Cir., 1907, 157 Fed. 554; see also 6 C.J.S. *Assignments* § 12, and as our preceding discussion demonstrates, contingent interests have been held to pass to the trustee in bankruptcy. The bankrupts do contend, however, that since the Assignment of Claims Act, *supra,* renders null and void assignments of claims against the United States, the right to the loss-carryback refund could not be "transferred" under § 70a(5). As heretofore noted, the Third Circuit in *Sussman* accepted this argument as an alternative basis for its holding that the carryback refund did not pass to the trustee.

It is settled law that the passage of title to a claim against the United States from the bankrupt to the trustee is not such a transfer or assignment as is barred by the Assignment of Claims Act. This is the principle enunciated in the *Kepp Elec. & Mfg. Corp.* case, *supra,* of the non-applicability of this Act to transfers effected by operation of law, and is the progeny of *Erwin* v. *United States,*

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[6] The question under consideration has had the attention of the commentators since the *Sussman* decision. See Herzog, Bankruptcy Law, Modern Trends, Journal of the National Association of Referees in Bankruptcy, Vol. 36, p. 18 (January 1962); XVI Univ. of Miami L. Rev. 345 (1961); 110 Univ. of Penn. L. Rev. 275 (1961); 14 Stanford L. Rev. 380 (1962); and 40 Tex. L. Rev. 569 (1962).

1878, 97 U.S. 659, 24 L.Ed. 1065. The point of the reasoning of the *Sussman* case was that the Assignment of Claims Act would, on the other hand, prevent a transfer of the refund right prior to and aside from bankruptcy, thereby [fol. 47] rendering the right non-transferable within the meaning of § 70a(5).

It is our opinion however, that this conclusion falls in light of the established law that an assignment of a claim or right against the United States is enforceable between the parties to such assignment, in that the bankrupt and the assignee could have entered into an enforceable contract whereby the bankrupt would have been bound to pay over the refund proceeds once he had received them from the government. *Martin* v. *National Surety Co.*, 1937, 300 U.S. 558, 57 S.Ct. 531, 81 L.Ed. 822; *California Bank* v. *United States Fidelity & Guar. Co.*, 9 Cir., 1942, 129 F.2d 751; and *Bank of California* v. *Commissioner*, 9 Cir., 1943, 133 F.2d 428. Thus, at the date of bankruptcy, the Segals were possessed of a valuable property right, capable of being converted into money value. We feel that this was sufficient transferability to meet the requirement of § 70a(5).

The *Sussman* court relied on *Matter of Ideal Mercantile Corp.*, 2 Cir., 1957, 244 F.2d 828, cert. denied, 1957, 355 U.S. 856, 78 S.Ct. 84, 2 L.Ed.2d 63, and *Wooton* v. *United States*, Ct. Cl., 1949, 86 F.Supp. 143, cert. denied, 1950, 339 U.S. 903, 70 S.Ct. 517, 94 L.Ed. 1333, in holding that a loss-carryback claim was not transferable. *Ideal* held that an assignment of a claim for refund of customs duties was not enforceable between the parties until the government allowed the claim, and hence that the assignment was not sufficiently "perfected" prior to bankruptcy to prevent [fol. 48] it from being a voidable preference under § 60a of the Bankruptcy Act. 11 USCA, § 96a. The court did not deal with the meaning of transferability under § 70a(5), nor did the court suggest that the assignee could not have enforced his assignment once the refund had been paid by the government. The *Wooten* case, as applicable here, es-

tablished no more than that the Assignment Act bars a direct suit by the assignee against the government.

Finally, we are of the opinion that the argument pressed here, and accepted in *Sussman*, proves too much. If the Assignment of Claims Act defeats the transferability of an inchoate claim for a loss-carryback refund, it should by the same logic render all tax claims against the United States non-transferable for Bankruptcy Act purposes. The Assignment Act would apply with equal force to all claims for tax refund, including those presently due and fixed in amount. They too must meet the transferability prerequisite of § 70a(5). Yet, it is established that the bankruptcy trustee succeeds to any accrued claim or right of action for tax refund the bankrupt may have against the government. 4 Collier, Bankruptcy ¶ 70.28[4], at 1250, and cases cited at note 27.[7] See also *In re Goodson*, S.D. Cal. 1962, 208 F.Supp. 837.

[fol. 49] For the foregoing reasons, we hold that an inchoate right to receive a loss-carryback refund is "property", and that it is property which the bankrupt could "by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. Consequently, the refund proceeds belong to the trustee.

Affirmed.

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[7] Collier cites *Chandler* v. *Nathans*, 3 Cir., 1925, 6 F.2d 725, which held that a refund claim was a "right of action . . . [for] the unlawful taking or detention of . . . property" within § 70a(6). This subsection contains no transferability requirement. The other cases cited by Collier do not specify whether the refund claim was deemed to pass to the trustee under § 70a(5) or under § 70a(6). In most tax refund cases, the government is not disputing that the taxpayer is entitled to return of the overpayment. Consequently, the "unlawful . . . detention of . . . property" language of § 70a(6) seems inappropriate, and such claims fall more comfortably within the general language of § 70a(5).

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1963

No. 21043

D. C. Docket No. 4951, 4952 & 4953—Bkcy.

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al., Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee, Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before Rives, Bell and Wright,* Circuit Judges.

JUDGMENT—September 9, 1964

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

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* Of the D. C. Circuit, sitting by designation.

It is further ordered and adjudged that the appellants, Gerald Segal, Individually and d/b/a Segal Cotton Products, and others, be condemned to pay, in solido, the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 9, 1964

Issued as Mandate: Oct 23 1964

[fol. 52]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,043

[Title omitted]

APPELLANTS' MOTION FOR RE-HEARING—
Filed September 30, 1964

To the Honorable Judge of Said Court:

Now comes Appellants in the above styled and numbered cause and file this their motion for re-hearing and say:

That on September 9th, 1964 this Honorable Court delivered its opinion and judgment in the above cause, and these Appellants say that the Court erred in the following respect:

Points of Error

The Court erred in its finding and determination that the trustee in bankruptcy as opposed to the bankrupts was entitled to the loss carry-back which had been paid for the entire calendar year of 1961.

[fol. 53] Syllabi of the Court's Opinion

The Court in its opinion reached the following conclusions, and based on such conclusions, justified its decision affirming the District Court below:

(1) That the loss carry-back adjustment is property as defined in Section 70a of the Bankruptcy Act, 11 U.S.C.A., Section 110a.

(2) That assuming the loss carry-back adjustment is property, such adjustment was transferable on the date of bankruptcy under Section 70a(5) of the Bankruptcy Act.

Argument

In the beginning of its opinion the Court stated that this appeal presented a question of prime importance in the administration of the Bankruptcy Act. After a short review of two cases which had held that the loss carry-back adjustment passed to the bankrupts rather than the trustee, (*In re*: *Sussman*, 3 Cir. 1961, 289 F. 2d, 77, and *Fournier* v. *Rosenblum*, 1 Cir. 1963, 318 F. 2d, 525) the Court set forth that it was the intent of Congress to secure to creditors all property of the bankrupt. It was then set out by the Court that the result in holding for the bankrupts here would be that such refunds would pass to the bankrupts freed from claims of their creditors, if such a right, as is in question in this case, was found to be outside the scope of the definition of transferable property as used in the Act. The Court concluded that this result would arise in spite of the fact that the refunds arose as [fol. 54] a result of the losses in the partnership business which gave rights to the claims of the creditors. The thing that the Court possibly overlooked in following this line of thinking, is that the principle of law which is made by their decision affects all refunds in the future, including those which could result from losses of a business operated subsequent to the discharge of the bankrupts, thus because the decision may result in a windfall in the present case is

not reason enough to bypass the explicit language of the Bankruptcy Act through the weaving of various unrelated decisions.

This Honorable Court in arriving at the conclusion that the loss carry-back adjustment is property within the language of Section 70a(5), cited several cases dealing with various types of rights of action which were held to be property. The Court cites *William* v. *Heard* 1891, 140 U. S. 529; *In re*: *Dorgan's Estate,* 1916, 237 F. 507; *Kleinschmidt* v. *Schroeter* 1938, 94 F. 2d 707; *Chandler* v. *Nathans* 1925, 6 F. 2d, 725, and *In re*: *Kepp Electric & Manufacturing Corporation,* 1951, 98 Fed. Supp. 51. Each of these cases cited by the Court have one thing in common, which does not apply to the case at bar. In each of these cases the right of action itself, or the right to the property was definite at the time of bankruptcy. In the *Williams* v. *Heard* case, supra, the right to the award arose some four years prior to bankruptcy and therefore was in existence at the time of bankruptcy, only the amount was contingent on the determination of Congress. In the case of *In re*: *Dorgan's Estate,* supra, the property right was clearly in [fol. 55] existence at the time of bankruptcy, again only the amount was questionable. That case resorted to special reasoning to support its decision. The Court stated in its opinion in the Dorgan's case, supra, that regardless of the contingency of the amount and value that "nevertheless a property right existed, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life." Therefore, there was in that case the possibility of approximation of amount and value. There was no question of the existence of the right to the proceeds. Again in the *Kleinschmidt* v. *Schroeter* case, supra, the right to a return of proceeds existed prior to bankruptcy and only the amount recoverable was contingent. The same is true of the *Chandler* v. *Nathans* case, supra. The case of *In re*: *Kepp Electric & Manufacturing Corporation,* supra, did not deal with the question of "property." Thus, each of

the cases cited by the Court in support of the proposition that the loss carry-back adjustment in the case at bar is property as defined by Section 70a(5) of the Bankruptcy Act is distinguishable from the case at bar. In no way can it be said that the *right* to the adjustment was definite at the time of bankruptcy of the Appellants. There was no right in existence. Therefore, the amount recoverable was not the contingency but the right itself, unlike cited cases of the Court. Therefore, the Court's basic assumption based on its reasoning of cited cases that the loss carry-back adjustment was property under the definition of 70a(5) seems somewhat questionable when the principal of [fol. 56] the cited cases is held up to the facts of the principal case.

This Honorable Court, after making the determination that the loss carry-back adjustment was property under Section 70a(5) continued forward and determined that such property right was transferable under the language of Section 70a(5). The appellants contended in their argument before this Honorable Court that the assignment of claims act would render null and void the assignment of such a right of action against the United States. This argument and reasoning was accepted by the Third Circuit in the *Sussman* case, supra. This Honorable court avoided the decision in the *Sussman* case, supra, and the reasoning used therein with its resort to the *In re*: *Kepp Electric & Manufacturing Corporation* case, supra. This Honorable Court relied entirely upon that case in its determination that the loss carry-back adjustment right was a transferable right. The *Kepp* case supra however, dealt with an entirely different question than the case at bar. The question in the *Kepp* case was whether a bankrupt could assign *monies* to be received from a claim against the Government and did not deal with the question of the assignment of the right itself as does this case. The reasoning used by this Court in bypassing the *Sussman* decision completely avoids the clear language of Section 70a(5) which speaks of "rights of action, which * * * could by any means have (been) transferred * * *".

This Honorable Court has by its reasoning and citing of various cases bypassed two well considered opinions by [fol. 57] other circuits, namely the Third Circuit and the First Circuit which had before them the very question which arises out of the case at bar. Appellants say that the language of Section 70a(5) of the Bankruptcy Act should be strictly adhered to and that the reasoning of this Court avoids such language.

Wherefore, Premises Considered, your Appellants pray this Honorable Court consider this motion for re-hearing, and upon re-hearing hereof this Court reverse the decision below and it be held that the bankrupts are entitled to the loss carry-back refund in question in this case, and for such other relief, both general and special, at law and in equity, to which Appellants are justly entitled.

Respectfully submitted,

Henry Klepak, Roy J. True, Attorneys for Appellants, 1509 Mercantile Bank Bldg., Dallas 1, Texas.

Certification

I hereby certify that a true and correct copy of this motion for re-hearing has been delivered to William J. Rochelle, Jr., Trustee, Republic National Bank Building, Dallas, Texas.

Henry Klepak

[fol. 58]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21043

[Title omitted]

Appeal from the United States District Court for the Northern District of Texas

---

ORDER EXTENDING TIME TO FILE PETITION FOR REHEARING

It Is Ordered that appellants be granted an extension until October 9, 1964, within which to file a petition for rehearing in the above entitled and numbered cause.

Griffin B. Bell, U. S. Circuit Judge

(Original Filed October 1, 1964)

[fol. 59]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,043

[Title omitted]

Appeal from the United States District Court for the Northern District of Texas

---

Before Rives, Bell, and Wright,* Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—October 12, 1964

Per Curiam:

It is Ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby Denied.

Petition for Rehearing filed: 9/30/64

Petition for Rehearing denied: 10/12/64

[fol. 60] Clerk's Certificate to foregoing transcript (omitted in printing).

---

* Of the D. C. Circuit, sitting by designation.

[fol. 61]

SUPREME COURT OF THE UNITED STATES

No. 817—October Term, 1964

GERALD SEGAL, individually and d/b/a SEGAL COTTON PRODUCTS, et al., Petitioners,

v.

WILLIAM J. ROCHELLE, JR., Trustee.

ORDER ALLOWING CERTIORARI—March 8, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
JAN 7 196
JOHN F. DAVIS, CL

In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 44

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,
Petitioner,

v.

WILLIAM J. ROCHELLE, JR., Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

HENRY KLEPAK,
1509 Mercantile Bank Bldg.,
Dallas, Texas 75201,
Attorney for Petitioner.

WARLICK PRESS, INC.—2363 VALDINA STREET—DALLAS—ME 1-3130

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GERALD SEGAL, Individually and d/b/a
SEGAL COTTON PRODUCTS, et al.,
Petitioner,

v.

WILLIAM J. ROCHELLE, JR., Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Gerald Segal, respectfully submits his petition for writ of certiorari and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled cause of September 9, 1964.

CITATIONS TO OPINIONS BELOW

The opinion of the Referee in Bankruptcy (R. 5-8) is unreported, and is printed in Appendix B hereto, *infra*, pp. 1-3.

The opinion of the District Court (R. 24-30), printed in Appendix B hereto, *infra*, pp. 3-9 is reported in 221 F. Supp. 282. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, pp. 12-22 is reported in 336 F. 2d 298.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9, 1964, (R. 38); Appendix B, *infra*, pp. 10-11. Rehearing was denied on October 12, 1964, (R. 59); Appendix B, *infra*, p. 23. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a loss carryback tax item under Title 26, 172 of the Revised Annotated Statutes is "property" as defined in Section 70(a)(5) of the Bankruptcy Act, at the time of the filing of the bankruptcy, but prior to the end of the taxable year.

STATUTE INVOLVED

The statutory provisions involved are § 70(a)(5) of the Bankruptcy Act, 11 U.S.C. § 110(a)(5). The statutory provisions are printed in Appendix A, *infra*, page 1.

STATEMENT

On September 27th, 1961, a voluntary bankruptcy petition was filed on behalf of Gerald Segal and Sam Segal, copartners, trading under the firm name of Segal Cotton Products. On the same date a voluntary bankruptcy petition was

filed on behalf of Sam Segal, individually and Gerald Segal, individually. Subsequently, after the end of the year of 1961, a claim for refund resulting from a loss carryback was made in behalf of the bankrupts. As a result of said claims for refund, the trustee received the refund checks on the claims. These funds, by agreement with the attorney for the bankrupts, were deposited in the trustee's bank account to be held in escrow by him pending final determination by the Court of the rights of the parties thereto. The various claims for refund were predicated and based on the entire calendar year of 1961, including that portion of the year subsequent to the filing of bankruptcy.

The Referee in Bankruptcy entered an order on the 4th day of June, 1963, denying the claim of the bankrupts that they were entitled to the proceeds of the tax refund resulting from loss carryback claims paid by the Director of Internal Revenue. The bankrupts duly and timely filed their petitions to review the order of the Referee in Bankruptcy. The Referee in Bankruptcy filed his Certificate of Review, (R. 2-8), including his Findings of Fact, Conclusions of Law and Opinion. The above mentioned Petitions and Certificate were considered by the United States District Court for the Northern District of Texas, Dallas Division. The District Court was of the opinion that the Referee's order should be in all things affirmed and approved, which it did on August 27th, 1963, (Appendix B, infra, pp. 3-9).

The Petitioner gave notice of appeal to the Court of Appeals for the Fifth Circuit and said Court, after due hearing,

affirmed the judgment of the lower court, (Appendix B, *infra*, pp. 10-11). Petitioner then filed a Motion for Rehearing in due time, which was denied on October 12, 1964, (Appendix B, *infra*, page 23), from which Petitioner files this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below in the instant case is in direct conflict with the decision of the Third Circuit Court of Appeals in *In Re: Sussman*, 289 F. 2d 77 (1961), Appendix C, infra, pp. 1-5, and of the First Circuit Court of Appeals in *Fournier v. Rosenblum*, 318 F. 2d 525 (1963), Appendix C, *infra*, pp. 6-10.

The conflict among the circuits was noted by Judge Bell in the opinion of the court below where he wrote: "With deference, and after careful consideration of the ruling of these respected sister courts, we find ourselves unable to follow their decisions." (R. 41), Appendix B, infra, pp. 14-15.

The specific conflict among the courts of appeals involves their interpretations of the word "property" found in Section 70(a) (5) of the Bankruptcy Act, 11 U.S.C. 110(a) (5). The conflict deals directly with an important question of statutory construction which now requires a uniform ruling on the point. *Shapiro v. U.S.*, 335 U.S. 1, 4; *Commissioner v. Bilder*, 369 U.S. 499, 501.

The impact of such a decision as that in the court below will not be narrowly confined and is apt to have serious consequences continuing into the future. Such a square and ir-

reconcilable conflict should be settled by this Honorable Court to insure finality and bring about uniformity of decisions of such an important matter among the Federal Courts of Appeals.

2. The question presented is of importance in the administration of the Federal bankruptcy and tax laws. *New York v. Saper*, 336 U.S. 328, 329. The opinion below begins by stating, "This appeal presents a question of prime importance in the administration of the Bankruptcy Act."

Settlement of the question by this court is in the public interest, since the principle of law which is made by the decision in the lower court effects all refunds in the future, including those which could result from losses incurred subsequent to the discharge of the bankrupt.

3. The decision of the court below is believed to be erroneous, and the conflicting decisions of the First and Third Circuit Courts of Appeals in *In Re: Sussman, Supra*, and *Fournier v. Rosenblum, Supra*, correct.

The Third Circuit Court of Appeals held in *Sussman, Supra*, that the right to a loss carryback adjustment is not "property" as defined in Section 70(a) of the Bankruptcy Act; and further, if "property", because of the proscription contained in the Assignment of Claims Act, 31 U.S.C.A., §203, it could not have been transferred prior to the filing of the petition in bankruptcy. The First Circuit in *Fournier v. Rosenblum, Supra*, held that the right to a loss carryback adjustment was not embraced in the concept of "property" as used in Section 70(a)(5) of the Bankruptcy Act. Thus,

prior to the decision of the court below, the law was settled that a loss carryback tax item was not "property" or a right of action which by statute vested in the trustee in Bankruptcy.

This change in accepted law as to what constituted "property" under Section 70(a)(5) of the Bankruptcy Act, 11 U.S.C.A. §110(a)(5), was not made by Congress expressly, but was construed by the court below from various distinguishable cases. Each of the cases cited by the court below in support of their application of Section 70(a)(5) of the Bankruptcy Act is distinguishable from the instant case as well as from *Sussman, Supra,* and *Rosenblum, Supra,* for the reason that in each of those cited cases the "right of action" was definite and existed prior to filing of the bankruptcy petition and only the amount was contingent. The distinguishing fact in the instant case is that there was no right of action which was in existence at the time the bankruptcy petition was filed. For the above reason, petitioner submits that the decision below is in error and that this petition should be granted because of the important question involved and the doubtful determination by the court below. *William v. Lee,* 358 U.S. 217, 218. The opposing application of Section 70(a)(5) of the Bankruptcy Act is set forth in detail in the opinion of the Third Circuit in *In Re: Sussman, Supra;* Appendix C, *infra,* pp. 1-5. In brief, the opposition of the First and Third Circuits (and of this petitioner) is that under the statute authorizing net operating loss carrybacks, the right to a loss carryback tax refund does not arise until the end of the taxable year in which the loss occurs, and

only a mere expectation can arise before the end of that taxable year. Therefore, there was no "property" which could pass to the trustee in bankruptcy from the filing of the bankruptcy petition as "property" is defined in Section 70(a)(5) of the Bankruptcy Act.

Further, if so well settled and fundamental and interpretation requires, as contended, alteration on the grounds of policy such as injustice to creditors of the bankrupt, relief is not with the courts, but with the legislature.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

.....

Henry Klepak

CERTIFICATE OF SERVICE

I hereby certify that I have delivered to Honorable William J. Rochelle, Jr., Attorney for Respondent, whose office is in Dallas, Texas, a copy of this Petition for Writ of Certiorari received by him this ..... day of January, 1965. 1965.

Respectfully submitted,

.....

Henry Klepak
Counsel for Petitioner

APPENDIX A — STATUTE

Bankruptcy Act §70a(5), 11 USCA §110a(5), in pertinent part as follows:

> "(a) The Trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * *"

APPENDIX B

OPINIONS AND JUDGMENT BELOW

Opinion of Referee

Section 70a of the Bankruptcy Act provides in part:

> "The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * *."

In the case of *In re Sussman*, 289 F. 2d 76 (3d Cir. 1961), the United States Court of Appeals for the Third Circuit held that a tax refund which was paid because of losses sustained during the year in which the bankruptcy petition was filed went to the bankrupt and not to the trustee. The court pointed out that there is no provision in law that bankruptcy terminates a taxable year, and said that therefore "when Sussman filed his bankruptcy petition he had no 'right of action' against the United States for the trustee to acquire under Section 70, sub. a(5) or (6)." The court found that this was a contingent claim against the United States which the court said could not be assigned.

The court conceded that the "unfortunate result" of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:

> "The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution."

The facts in the case at bar cannot, in my opinion, be distinguished from those of the *Sussman* case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. But *Sussman* has been severely criticized. I am persuaded by the arguments advanced against it that *Sussman* was incorrectly decided. Therefore, I have declined to follow it and have ruled that these refunds are assets of the bankrupt estates.

The articles to which I have reference are: "Property Which Passes to a Trustee—A Critical Analysis of In Re Sussman" in "Bankruptcy Law — Modern Trends" by Referee Asa S. Herzog of the Southern District of New York, 36 Journal of the National Association of Referees in Bankruptcy, page 18, and "Windfall for Bankrupts: Loss Carryback Claims Do Not Vest in Trustee" originally appearing in the Stanford Law Review and reprinted by permission in 36 Journal of the National Association of Referees in Bankruptcy, page 116. Marked copies of the issues of the Journal containing these articles are attached to this

certificate, and I shall not undertake to repeat what they say.

I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser v. Tucker*, 26 S.W. 1044, 1045; *Wheeler v. Riviera*, 49 S.W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a (5) of the Bankruptcy Act unless they were non assignable by reason of being claims against the United States. The Court of Appeals thought that they were non assignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decisions to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin v. United States*, 97 U.S. 392, 397, and *National Bank v. Downie*, 218 U.S. 345.

It seems clear that section 72 of the Bankruptcy Act does not require or even permit the inequitable result which the Court of Appeals ascribed to it while deploring the result.

Opinion of the District Court

OPINION OF THE COURT

(Number and Title Omitted)

Filed: Aug. 26, 1963

The controversy in this case grows out of a Certificate of Review to this court by Honorable Elmore Whitehurst, Referee in Bankruptcy at Dallas, Texas.

The question presented, in short, is "Does a carryback tax item under Title 26, 172 of the Revised Annotated Statutes belong to the Trustee for the benefit of creditors, or does it go to the bankrupt?

The Referee held that it belonged to the Trustee, notwithstanding the opinion in the *Sussman* case in the Third Circuit, 289 F. 2d 76. We adopt in part the Certificate of the Referee and the quotations there made by him as follows:

"In the Sussman case the court conceded that the 'unfortunate result' of its ruling was a windfall to the bankrupt at the expense of the creditors and commented:

> 'The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a, have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution.'

"The facts in the case at bar cannot, in my opinion, be distinguished from those of the Sussman case, and if that case was correctly decided then the bankrupts here and not the trustee are entitled to these refunds. * * * I am persuaded by the arguments advanced against it that Sussman was incorrectly decided. Therefore, I have declined to follow it, and have ruled that these refunds are assets of the bankrupt estates. * * *"

The Referee continues:

"I should like to add, however, that in Texas a contingent claim is transferable by assignment. *Moser v. Tucker*, 26

S.W. 1044, 1045; *Wheeler v. Riviera*, 49 S.W. 697, error refused. Accordingly, these claims were vested in the trustee as of the filing of the bankruptcy petitions by section 70a (5) of the Bankruptcy Act unless they were nonassignable by reason of being claims against the United States. The Court of Appeals thought that they were nonassignable for this reason, but as pointed out in the articles above referred to, two United States Supreme Court decisions to the contrary were not referred to and it can only be presumed that they were not called to the attention of the court and hence overlooked. These cases are *Erwin v. United States*, 97 U.S. 392, and *National Bank v. Downie*, 218 U.S. 345."

Our view of the case is that of the Referee. Indeed, Judge Hastie, in the closing words of his opinion in the Sussman case, manifestly felt that the strict interpretation of the statute, as he viewed it, tended to smother the spirit of the law and to stand aside the urging of the principles of equity and fair play. We agree with Judge Hastie that the opinion does result in an injustice to the creditors. We think there is a better way of solving the problem.

Justice Cardoza in *Martin v. National Surety Co., et al*, 300 U.S. 588, leaves open the door for a more satisfactory light upon the question:

> "* * * the statute must be interpreted in the light of its purpose * * * An assignment ineffective at law may none the less amount to the creation of an equitable lien * * * It would be a strange construction of the statute that would make it necessary for the Government to declare the equities illusory when they serve its own good."

The syllabus in the Martin case, Section 2 thereof, clearly sums up the effect of the decision:

> "2. The provisions of R. S., § 3477; 31 U.S.C. 203, declaring all assignments of any claim upon the United States 'absolutely null and void' unless made after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof, are provisions for the protection of the Government, and not for the regulation of the equities of claimants growing out of regular assignments, when collection is complete and the Government's liability ended. P. 594."

The court in this case says in the Opinion:

> "We conclude that Martin's interest in the fund was correctly held to be subordinate to the interests of other claimants."

The Sussman decision, which is in conflict with the Referee's holding, we find is ably discussed and criticized in the Journal of the National Association of Referees in Bankruptcy, issue of October 1962, page 116, from which we quote:

> "The admittedly inequitable consequences of the Sussman decision resulted from an incorrect application of section 70(a).
>
> "The court reasoned that the carryback claim could not be an existing property interest at the time the petition was filed because section 172 of the Internal Revenue Code bases carryback refunds upon net operating losses for the taxable year. The bankrupt could not have presented his claim until nearly seven months after his petition was filed. However, his inability to present his claim when the petition was filed should not, in itself, prevent the claim from vesting in the trustee, for it is possible to have an existing interest in property without having an immediate right to en-

joy that property". For example, one who holds a note payable at the end of the year has an existing property interest even though he has no immediate right to collect the debt. * * *"

"The Sussman court's conclusion that the right itself did not come into existence until the end of the taxable year must have been based upon the uncertainty of the claim rather than its immaturity, for the court assumed that the bankrupt could possibly earn enough during the remainder of the year to offset his losses and eliminate the availability of a carryback. Several cases involving claims of far greater uncertainty make it clear that a contingent claim can vest in the trustee. In the leading case of *Williams v. Heard* the bankrupt's award for losses caused by the activities of British-built Confederate cruisers was held to have vested in the trustee even though the bankrupt had no enforceable claim at the time of bankruptcy and it seemed unlikely that he ever would have such a claim. The Court reasoned that the bankrupt did have a right to compensation at the time he was adjudicated a bankrupt even though he then had no remedy. In determining that this particular inchoate claim was sufficiently in existence to vest in the trustee the court relied upon the test laid down by Justice Story in *Comegy v. Vasse.* * * * If the Sussman court had applied this test, it would have found that the carryback claim was an existing property interest; for, if the bankrupt had died at the time the petition was filed, it is clear that his administrator could have claimed the refund for the benefit of the estate."

"The Sussman court further reasoned that, even if the claim was an existing property interest, it was not the type of interest which can be transferred or levied upon, as required for it to vest in the trustee under section 70(a) (5) of the Bankruptcy Act, because the Federal Anti-Assignment Statute forbids the assignment of unallowed claims against the government.

However, the Supreme Court decided in *Erwin v. United States* that the Anti-Assignment Statute does not prevent such claims from vesting in the trustee in bankruptcy."

The author of the article in the magazine cites authorities thus:

"An immature carryback claim was held to be assignable under ch. XI arrangement proceedings in the case of *In re Kepp Elec. & Mfg. Co.*, 98 F. Supp. 51 (D. Minn. 1951). The debtor assigned all his claims for tax refunds to a receiver for the benefit of the unsecured general creditors. * * * There is no apparent reason why a claim which is sufficiently in existence to be assignable under ch. XI proceedings should not be sufficiently in existence to vest in the trustee under §70 (a)."

"Since the *Sussman* case arose in Pennsylvania it may be significant that the Pennsylvania courts have held that contingent remainders are subject to execution and do vest in the remainderman's trustee in bankruptcy. E. G., *In re Packer's Estate*, 246 Pa. 116, 92 Atl. 70 (1914) (bankruptcy); *De Haas v. Bunn*, 2 Pa. 335 (1845) (execution). In the *Dorgan* case, (237 Fed. 507), supra, the court said: 'Such interest is a property right —contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right * * * The trustee, or purchaser from him, simply stands in the shoes of the bankrupt, receiving something, or possibly nothing, ultimately; but it is a right which should have a value, and, having a value, under the policy of the law, in case of bankruptcy, it passes to the trustee for the benefit of creditors. *The whole policy of the Bankrupt Act is that all nonexempt property of the bankrupt * * * shall be subjected to the payment of the debts of the bankrupt.*' 237 Fed. at 509. (Emphasis added.)"

The general purpose and policy of the Bankruptcy Act, from its incipiency has been, and is that all property of

the bankrupt shall be subject to the payment of his debts. As suggested by the authorities quoted, had the bankrupt died solvent, his legal representative should and would have listed his claim and collected it. Nowhere else could the fund have gone except to his estate, if he had been solvent. Since he is insolvent, it must go to his creditors.

(Signed) T. WHITFIELD DAVIDSON
T. Whitfield Davidson
United States District Judge

Judgment of Court of Appeals

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 21043

D. C. Docket No. 4951, 4952 & 4953-Bkcy.

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before RIVES, BELL, and WRIGHT*, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Gerald Segal, Individually and d/b/a Segal Cotton Products, and others, be condemned to pay, in solido, the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 9, 1964

Issued as Mandate: Oct. 23, 1964

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* Of the D. C. Circuit, sitting by designation.

Opinion of the Court of Appeals

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21043

D. C. Docket No. 4951, 4952 & 4953-Bkcy.

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Appellants,

versus

WILLIAM J. ROCHELLE, JR., Trustee,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(September 9, 1964.)

Before RIVES, BELL and WRIGHT,* Circuit Judges.

BELL, Circuit Judge: This appeal presents a question of prime importance in the administration of the Bankruptcy Act. At issue is whether loss-carryback refunds forthcoming under the federal income tax statutes[1] and

* Of the D.C. Circuit, sitting by designation.

[1] §172 of the Internal Revenue Code of 1954, 26 USCA, §172.

arising from losses sustained prior to but in the year of bankruptcy go to creditors or the bankrupt.

Gerald Segal and Sam Segal, as individuals, filed voluntary petitions in bankruptcy on September 27, 1961. On the same date Segal Cotton Products, a partnership composed of Gerald Segal and Sam Segal, filed a voluntary petition in bankruptcy. The trustee here was duly appointed and qualified in all three proceedings.

Segal Cotton Products incurred losses during the year 1961 prior to the filing of the petition on September 21. The trustee filed claims for loss-carryback adjustments with the Internal Revenue Service in light of income taxes having been paid by the individual partners for the two preceding years. Tax refunds were obtained pursuant thereto, and these were the subject matter of claims filed on behalf of Gerald and Sam Segal which were denied by the Referee.[2] The District Court affirmed, holding that the refunds were assets of the trustee for the benefit of creditors. This holding was contrary to that of the Third Circuit, on similar facts, in the case of *In re Sussman*, 3 Cir., 1961, 289 F. 2d 77, and that of the First Circuit in *Fournier v. Rosenblum*, 1 Cir., 1963, 318 F. 2d 525. This appeal followed.

The question presented is whether the rights to the loss-carryback adjustments passed to the trustee. The bankrupts contend that the rights accrued after the date of

[2] The refunds to Gerald Segal were in the amounts of $283.07 on the 1961 loss-carryback to 1960, and $1,608.21 to 1959. The refunds to Sam Segal were in the amount of $505.63 to 1960, and $1,839.41 to 1959.

bankruptcy since applications for refunds, resting as they must on the results of the whole taxable year, could not have been filed until the end of the year. The answer depends on whether such a right to refund or adjustment is transferable property within the meaning of 11 USCA, § 110a(5), § 70a(5) of the Bankruptcy Act, in pertinent part as follows:

> "(a) The Trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * *"

It is to be noted that the term "property" as used in this section includes rights of action which could have been transferred prior to the filing of the petition.[3] The court held in *Sussman, supra,* that the right to a loss-carryback adjustment is not property as defined in § 70a; and further, if property, because of the proscription contained in the Assignment of Claims Act, 31 USCA, § 203, it could not have been transferred prior to the filing of the petition in bankruptcy. In *Fournier v. Rosenblum, supra,* the court went only so far as to hold that the right was not embraced in the concept of property as used in § 70a. With deference, and after careful consideration of the reasoning of these

[3] The statute also includes rights of action which could have been levied upon and sold under judicial process, or otherwise seized, impounded or sequestered. In the view we take of the case, any consideration of these qualifications is pretermitted.

respected sister courts, we find ourselves unable to follow their decisions. We hold that the right to a loss-carryback refund or adjustment, although contingent as to amount, is transferable property within the meaning of § 70a(5), and affirm.

We begin with the proposition that it was the intent of Congress to secure to creditors all property of a bankrupt. The refunds here in question will pass to the bankrupts freed from claims of their creditors if such a right is outside the scope of the definition of property as used in the Act. This will be the result in spite of the fact that the refunds arose as a result of losses in the partnership business which in the first place caused the claims of the creditors to come into existence. This windfall to the bankrupts at the expense of the creditors was recognized by the court in *Sussman*, and *Fournier v. Rosenblum*, but each court felt that it was a matter which required legislative correction.

Our conclusion stems from a construction which gives effect to the congressional intent. It is true that the refunds flow from newly created rights in the sense that the loss-carryback provision came into the law in 1942, after the enactment of § 70a(5) in 1898. Moreover, such refunds may not be sought until the end of the taxable year in which the losses arise, and thus the realization of the right is not only deferred but a contingency is posed as to the amount of the loss since conceivably the applicable losses may be reduced or increased after the date of the filing of the petition in bankruptcy.

There is nothing in the language of the statute to indicate that the scope of the definition of property is to be limited to property rights existing when the statute was enacted. This conclusion must be coupled with the fact that the concept of property as used in the Bankruptcy law has been held, over a long period of years, to include rights depending on contingencies. In *William v. Heard*, 1891, 140 U.S. 529, 11 S. Ct. 885, 35 L. Ed. 550, the predecessor bankruptcy statute provided that all of the "estate, debts, and effects" of the bankrupt were to be recovered for the creditors. This was said to embrace his whole property. The facts were that during the Civil War the bankrupts had paid extra insurance premiums to cover war risks created by Confederate ships sponsored by Great Britain. In 1871, the United State secured an international reparations award of 15 million from Great Britain to be distributed by Congress as it saw fit. Congress set up a commission to determine distribution of the fund in 1874, and the bankruptcy occurred in 1875. No steps were taken to recover an award for the extra premiums paid until 1882 when Congress expressly provided for such recovery, and the award was made in 1886. The question was presented of ownership of the award as between the assignee of the bankrupts and them individually, they having been discharged in 1877.[4] The court held that the bankrupts had at the time of bankruptcy a possibility, coupled with an interest, of recovering the premiums, and that such was property

[4] Under the bankruptcy practice then in effect the bankrupts were required to make a conveyance of "all [their] estate, real and personal" to an assignee. This is to be compared with the present practice of all property of the bankrupt passing by operation of law to the trustee.

within the meaning of the Act which had passed to the assignee of the bankrupts.

The case of *In re Dorgan's Estate*, S.D., Iowa, 1916, 237 Fed. 507 involved an Iowa will giving the residue to the wife for life, with "full power to use the same * * * as she may see fit," and at the wife's death, remainder to bankrupt of "all the proceeds * * * left." The petition in bankruptcy was filed during the lifetime of the wife. Under Iowa law, this will created a life estate in the wife, with a vested remainder, subject to divestment, in the bankrupt. The court held that the bankrupt's interest passed to the trustee, saying "Such interest is a property right — contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life."

The case of *Kleinschmidt v. Schroeter*, 9 Cir., 1938, 94 F. 2d 707, presented a situation where the bankrupt was engaged in a joint mining venture, advanced part of his contribution to the venture, but defaulted on the rest. Under the joint venture agreement he thereby forfeited all interest in the venture, except the conditional right to a return of his prior contribution if the venture made a profit or was sold at a profit. The court held that the conditional right of the bankrupt to a return of his contribution passed to the trustee in bankruptcy by operation of § 70a.

See also *Chandler v. Nathans*, 3 Cir., 1925, 6 F. 2d 725, which based the passing of an income tax refund claim pend-

ing when the bankruptcy petition was filed on the premise that it was a right of action arising from the unlawful taking or detention of property of the bankrupt within the meaning of § 70a(6) of the Act. And *cf. In re Kepp Elec. & Mfg. Corp.*, D. Minn., 1951, 98 F. Supp. 51, a Chapter XI arrangement proceeding, where the debtor transferred various assets to a receiver, including all tax refunds due and owing the debtor from the United States government. The assignment of loss-carryback claims was prior to the end of the taxable year. The Commissioner of Internal Revenue maintained that the transfer of the refund claim was void as violating the Assignment of Claims Act. It was held that this Act did not apply to assignments which occur through operation of law, and that a Chapter XI transfer to a receiver occurs by operation of law. Apparently no question was presented as to whether the assignment might be invalid because of its being contingent, and there was no contest between the receiver and an assignee as distinguished from the government.

Thus it is that these authorities have considered contingent rights as property under the Bankruptcy Act. They are applicable and persuasive by analogy. We hold that the right to claim loss-carryback refunds under the circumstances of this case is property as that term is used in § 70(a) (5), notwithstanding that the claim is subject to adjustment in the event the taxpayer has other losses or earnings during the balance of the year, and the claim may not be

filed until the end of the taxable year.[5] This right of action springs from and rests on the fact that the income taxes theretofore paid were paid subject to adjustment in the event of future losses, and are available for that purpose to the end of providing the refund. The right to adjustment is definite; the time for filing the claim is definite; only the amount of the refund is contingent and this meets the test of a possibility vested with an interest set out in *Williams v. Heard, supra.*[6]

Accepting that the inchoate right to the loss-carryback refund is "property", this leaves for decision whether it is property which the bankrupt "could by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. It is not contended that the contingent and defeasible nature of the refund claim prevents it from being transferable. Contingent property interests are, of course, assignable at common law, *In re Landis*, 7 Cir., 1930, 41 F. 2d 700; *In re Wright*, 2 Cir., 1907, 157 Fed. 554; see also 6 C.J.S. *Assignments* § 12, and as our preceding discussion demonstrates, contingent interests have been held to pass to the trustee in bankruptcy. The bankrupts do contend,

[5] A proration of the refund in the ratio of the losses before and after the filing date would be indicated in the event of losses after the filing date. Earnings after the filing date would simply reduce the amount of the refund to the trustee. The fact that the refund claim is unmatured, in the sense that the taxpayer may not file for it until the end of the taxable year, would not appear to prevent the claim from being "property" within §70a(5). This is an everyday occurrence where notes due and accounts receivable at a future date pass to the trustee in bankruptcy.

[6] The question under consideration has had the attention of the commentators since the *Sussman* decision. See Herzog, Bankruptcy Law, Modern Trends, Journal of the National Association of Referees in Bankruptcy, Vol. 36, p. 18 (January 1962); XVI Univ. of Miami L. Rev. 345 (1961); 119 Univ. of Penn. L. Rev. 275 (1961); 14 Stanford L. Rev. 380 (1962); and 40 Tex. L. Rev. 569 (1962).

however, that since the Assignment of Claims Act, *supra*, renders null and void assignments of claims against the United States, the right to the loss-carryback refund could not be "transferred" under § 70a(5). As heretofore noted, the Third Circuit in *Sussman* accepted this argument as an alternative basis for its holding that the carryback refund did not pass to the trustee.

It is settled law that the passage of title to a claim against the United States from the bankrupt to the trustee is not such a transfer or assignment as is barred by the Assignment of Claims Act. This is the principle enunciated in the *Kepp Elec. & Mfg. Corp.* case, *supra*, of the non-applicability of this Act to transfers effected by operation of law, and is the progeny of *Erwin v. United States*, 1878, 97 U.S. 659, 24 L. Ed. 1065. The point of the reasoning of the *Sussman* case was that the Assignment of Claims Act would, on the other hand, prevent a transfer of the refund right prior to and aside from bankruptcy, thereby rendering the right non-transferable within the meaning of § 70a(5).

It is our opinion however, that this conclusion falls in light of the established law that an assignment of a claim or right against the United States is enforceable between the parties to such assignment, in that the bankrupt and the assignee could have entered into an enforceable contract whereby the bankrupt would have been bound to pay over the refund proceeds once he had received them from the government. *Martin v. National Surety Co.*, 1937, 300 U.S. 558, 57 S. Ct. 531, 81 L. Ed. 822; *California Bank v. United States Fidelity & Guar. Co.*, 9 Cir., 1942, 129 F. 2d 751;

and *Bank of California v. Commissioner*, 9 Cir., 1943, 133 F. 2d 428. Thus, at the date of bankruptcy, the Segals were possessed of a valuable property right, capable of being converted into money value. We feel that this was sufficient transferability to meet the requirement of § 70a(5).

The *Sussman* court relied on *Matter of Ideal Mercantile Corp.*, 2 Cir., 1957, 244 F. 2d 828, cert. denied, 1957, 355 U.S. 856, 78 S. Ct. 84, 2 L. Ed. 2d 63, and *Wooton v. United States*, Ct. Cl., 1949, 86 F. Supp. 143, cert. denied, 1950, 339 U.S. 903, 70 S. Ct. 517, 94 L. Ed. 1333, in holding that a loss-carryback claim was not transferable. *Ideal* held that an assignment of a claim for refund of customs duties was not enforceable between the parties until the government allowed the claim, and hence that the assignment was not sufficiently "perfected" prior to bankruptcy to prevent it from being a voidable preference under § 60a of the Bankruptcy Act. 11 USCA, § 96a. The court did not deal with the meaning of transferability under § 70a(5), nor did the court suggest that the assignee could not have enforced his assignment once the refund had been paid by the government. The *Wooten* case, as applicable here, established no more than that the Assignment Act bars a direct suit by the assignee against the government.

Finally, we are of the opinion that the argument pressed here, and accepted in *Sussman*, proves too much. If the Assignment of Claims Act defeats the transferability of an inchoate claim for a loss-carryback refund, it should by the same logic render all tax claims against the United States non-transferable for Bankruptcy Act purposes. The Assign-

ment Act would apply with equal force to all claims for tax refund, including those presently due and fixed in amount. They too must meet the transferability prerequisite of § 70a(5). Yet, it is estabilised that the bankruptcy trustee succeeds to any accrued claim or right of action for tax refund the bankrupt may have against the government. 4 Collier, Bankruptcy ¶ 70.28[4], at 1250, and cases cited at note 27.[7] See also *In re Goodson*, S.D. Cal., 1962, 208 F. Supp. 837.

For the foregoing reasons, we hold that an inchoate right to receive a loss-carryback refund is "property", and that it is property which the bankrupt could "by any means have transferred" within the meaning of § 70a(5) of the Bankruptcy Act. Consequently, the refund proceeds belong to the trustee.

AFFIRMED.

[7] Collier cites *Chandler v. Nathans*, 3 Cir., 1925, 6 F. 2d 725, which held that a refund claim was a 'right of action * * * [for] the unlawful taking or detention of * * * property' within §70a(6).This subsection contains no transferability requirement. The other cases cited by Collier do not specify whether the refund claim was deemed to pass to the trustee under §70a(5) or under §70a(6). In most tax refund cases, the government is not disputing that the taxpayer is entitled to return of the overpayment. Consequently, the 'unlawful * * * detention of * * * property' language of §70a(6) seems inappropriate, and such claims fall more comfortably within the general language of §70a(5).

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B-23

Order Denying Petition for Rehearing in the Court of Appeals

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21043

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Appellants,

v.

WILLIAM J. ROCHELLE, JR., Trustee,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(October 12, 1964)

Before RIVES, BELL, and WRIGHT,* Circuit Judges:

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

Petition for Rehearing filed: 9-30-64

Petition for Rehearing denied: 10-12-64

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* Of the D. C. Circuit, sitting by designation.

APPENDIX C

CONFLICTING OPINIONS

In the Matter of David SUSSMAN and Charles Sussman, individually and as co-partners, trading as Charles Company, Bankrupts.

Melvin Talus, John T. Durnin and Harry S. Mayer, Trustees, Appellants.
No. 13398.

United States Court of Appeals
Third Circuit.

Argued Feb. 7, 1961.
Decided April 3, 1961.

HASTIE, Circuit Judge.

The bankrupt, Charles Sussman, was a partner in a business which sustained heavy losses in the early months of 1956. Sussman individually, as well as the partnership, filed a petition in bankruptcy on June 7, 1956.

For the calendar years 1954 and 1955, Sussman had paid income taxes pursuant to joint returns filed by him and his wife. Mrs. Sussman had no income. The 1956 business reverses, which caused Sussman's bankruptcy in June, also resulted, at the end of the year, in a situation in which a proper income tax return for the calendar year would show a substantial net loss. Accordingly, in March, 1957, the trustee in bankruptcy filed an application on behalf of the bankrupt for a tentative carryback adjustment for the years 1954 and 1955 as justified by the bankrupt's demonstrated substantial

net operating loss for the calendar year 1956. In July, 1957, this claim was allowed and a refund check was delivered to the trustee. Thereafter, the bankrupt and his wife sought in the bankruptcy proceeding to compel the trustee to surrender this refund to them. The referee so directed and the district court affirmed the referee's order. This appeal followed.

The controlling provisions of the Bankruptcy Act appear in Section 70, sub. a, 11 U.S.C.A. §110, sub. a. That section provides, in relevant part,[1] as follows:

> "(a) The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property * * *."

It is not disputed that the "rights of action" which pass to the trustee under the above quoted language of Section

[1] In the court below there seems to have been some consideration of other provisions of Section 70, sub. a, particularly the provisions added to Section 70, sub. a by the Chandler Act to prevent windfalls to a bankrupt during the months immediately after bankruptcy. But those provisions, as they appear in clause (7) of Section 70, sub. a and in the unnumbered paragraphs at the end of the section, do not cover the present situation. They embrace, first, contingent interests in real estate which become assignable by the bankrupt within six months after bankruptcy; second, bequests, devises and inheritances which vest in the bankrupt within six months after bankruptcy; and, third, any property, held in estate by the entirety and vested in the bankrupt and another at the time of bankruptcy, which within six months thereafter becomes transferable by the bankrupt alone. The present case obviously is not within either the first or the second category. The third category does not embrace the present claim because the spouses had no vested right to a refund when the bankruptcy petition was filed.

70, sub. a include accrued and immediately determinable and enforceable claims for tax refunds or rebates which the bankrupt himself had or could have asserted against the United States at the time his petition in bankruptcy was filed. *Chandler v. Nathans*, 3 Cir., 1925, 6 F. 2d 725; cf. *Hoffman v. United States*, D.C.S.D. N.Y. 1940, 32 F. Supp. 939. But in this connection it is important to keep in mind that such a right of action for a tax refund is created and defined by the statutes in which the United States authorizes a taxpayer to assert such a claim. In the present situation the statutory basis of a loss carry-back claim, as the court below has properly pointed out, is a taxpayer's economic experience for a unit of time, an entire taxable year. This is clear because the net operating loss upon which any claim for a carry-back must be based is the excess of allowable deductions over the taxpayer's gross income as computed in a tax return for a taxable year. Int. Rev. Code §172 (c), 26 U.S.C.A. §172(c). Thus, the statutory scheme precludes the existence of any carry-back claim until the end of a taxable year.

It has already been stated that Sussman's taxable year was the calendar year. There is no provision in law that bankruptcy terminates a taxable year. Therefore, when Sussman filed his bankruptcy petition he had no "right of action" against the United States for the trustee to acquire under Section 70, sub. a(5) or (6).

More generally, paragraph 70 sub. a(5) provides that the trustee shall acquire the "title" of the bankrupt to all "property" which is subject to assignment by the bankrupt or levy against him when the petition is filed. Of course,

this concept of "title" to "property" connotes an ownership interest in some res, whether that res shall be corporeal property or a chose in action. In June, 1956, Sussman may well have contemplated the likelihood that he would be able to assert a loss carry-back claim against the United States within a few months. But he could point to no existing fund and to no existing cause of action in which he had any legal or equitable interest.

Perhaps this June expectation that a right to a refund would arise six or seven months later can be described as a contingent claim against the United States. But no such formulation can enlarge or in any way alter the limiting terms and conditions upon which the sovereign has agreed to recognize such a claim. The United States has not agreed that such a contingent claim against it can be assigned or attached, as Section 70, sub. a(5) requires. Rather, the transferability of claims against the United States has been narrowly restricted by the Assignment of Claims Act, 31 U.S.C.A. §203. Certainly, in June, 1956, Sussman's expectation of a future claim against the government was not assignable, even as between Sussman and any assignee. Cf. *Matter of Ideal Mercantile Corp.*, 2 Cir., 1957, 244 F. 2d 828, certiorari denied 1957, 355 U.S. 856, 78 S. Ct. 84, 2 L. Ed. 2d 63; *Wooton v. United States*, 1949, 86 F. Supp. 143, 114 Ct. Cl. 608, certiorari denied 1950, 339 U.S. 903, 70 S. Ct. 517, 94 L. Ed. 1333.

We find the conclusion inescapable that in June, 1956 Sussman had no right of action against the United States and no vested or transferable property in his anticipated

claim against the United States, within the meaning of Section 70, sub. a of the Bankruptcy Act. The unfortunate result of this is, as the referee pointed out, "a windfall to the bankrupt at the expense of the creditors". The fact that the very business losses which destroyed normal capacity to pay creditors have led to the tax rebate, makes it particularly unfair that this fund should be beyond the reach of the bankrupt's creditors. Thus, the normally satisfactory provisions of Section 70, sub. a have inequitable consequences in this very special situation. But we cannot correct this. Such a matter requires a legislative solution.

The judgment will be affirmed.

Henry FOURNIER, Appellant,

v.

Miriam G. ROSENBLUM, Trustee,
Appellee.

In the Matter of Henry FOURNIER,
d/b/a Henry's Men's Wear,
Bankrupt.

No. 6091.

United States Court of Appeals
First Circuit.

June 12, 1963.

Before WOODBURY, Chief Judge, and HARTIGAN and ALDRICH, Circuit Judges.

WOODBURY, Chief Judge.

The appellant, Henry Fournier, to be referred to hereinafter as the bankrupt, paid income taxes for the calendar years 1958 and 1959 pursuant to joint returns filed by him and his wife. In 1960 he suffered financial reverses and on December 6 of that year he filed a voluntary petition in bankruptcy with the clerk of the United States District Court for the District of New Hampshire. The first meeting of creditors was held on December 21, 1960, when the appellee's predecessor was appointed trustee.

On June 8, 1961, the bankrupt and his wife filed their joint income tax return for the calendar year 1960 and with

their return filed application for a tentative carryback adjustment of their taxes for the years 1958 and 1959 based on the bankrupt's net operating loss for the calendar year 1960. The bankrupt's claim was allowed on June 29, 1961, and he received a refund check from the United States in the amount of $2,800.52. The bankrupt's wife disclaimed any interest in the amount of this refund but his trustee in bankruptcy claimed it and filed a petition in the bankruptcy proceeding for an order directing the bankrupt to turn the amount of the refund over to her for the benefit of creditors. The Referee so directed, the United States District Court for the District of New Hampshire affirmed without opinion and this appeal followed.

This case is on all fours with *In re Sussman*, 289 F. 2d 76 (C.A. 3, 1961), in which the court regretfully held for the bankrupt. A factual difference between that case and this is that in *Sussman* the petition was filed about the middle of the bankrupt's taxable year in which he suffered his recoupable loss, whereas in this case the petition was filed toward the end of that year.[1] Thus in *Sussman* there was a longer period of uncertainty whether the bankrupt's loss would survive to the end of the calendar and his taxable year. Nevertheless, in this case as in that, the prospective loss deduction was subject to an element of uncertainty and incalculability at the time the petition in bankruptcy was filed. The difference is merely one of degree. The question in both cases is whether the bankrupt's ex-

[1] The cases also differ quite immaterially in that in Sussman the trustee applied for and received the loss carryback refund and the bankrupt sought to recover it from the trustee, whereas here the situation is reversed.

pectancy as of the date of the filing of his petition in bankruptcy of a net loss carryback refund constituted either "property" or a "right of action" within the meaning of § 70, sub. a(5) and (6) of the Bankruptcy Act as it now stands. 52 Stat. 880, 11 U.S.C. § 110, sub. a(5) and (6). The immediate question for us is whether or not to follow the Third Circuit in the *Sussman* case.

Section 70, sub. a(5) and (6) insofar as material provides:

> "The trustee of the estate of a bankrupt * * * shall * * * be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered: * * * (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; * * *".

Obviously the critical date is the date of the filing of the petition in bankruptcy and equally obviously what vests by operation of law in the trustee in bankruptcy as of that date is the bankrupt's "title" to "property" or "rights of action." The first and basic inquiry, therefore, is whether the bankrupt's prospective, indeed expectant, right to a net loss carryback refund falls into either one of these categories. We think it does not.

Since the provision of the Internal Revenue Code of 1954 authorizing net operating loss carrybacks (§ 172) does so

on the basis of the taxpayer's experience for a taxable year, the right to a loss carryback refund does not arise until the end of the taxable year in which the loss occurs. Thus it cannot be said that a bankrupt's losses create a right to a carryback as soon as they occur, even though the right be unenforceable until the end of the bankrupt taxpayer's accounting period, for it is evident that a taxpayer who sustains a net operating loss for a portion of his taxable year may earn or acquire, as by winning a large bet or holding a winning sweepstakes ticket, enough income during the balance of the year to offset or reduce his loss. As the court pointed out in *Sussman*, 289 F. 2d at page 77, "* * * the statutory scheme precludes the existence of any carry-back claim until the end of a taxable year." Therefore no claim, but only a prospect or expectation of a claim, to a net loss carryback refund can arise until the end of a taxable year, and the prospect, hope or expectation of a claim is not a right of action.[2]

Nor is the prospect that a right of action may arise "property." For, again as the court pointed out in *Sussman* (289 F. 2d at page 78), the concept of "title" to "property" connotes a definable ownership interest in some res, whether that res be corporeal property or a chose in action. Here, however, there was no res or chose in action in existence on the date of the filing of the petition in bankruptcy. At that time the bankrupt could point to no existing fund and to no existing right in which he had any legal or equitable interest.

[2] *A fortiori*, there is no "right of action" of the types specifically enumerated in §70, sub. a(6) of the Act.

Since we hold that the bankrupt's prospective claim was neither "property" nor a "right of action" within the meaning of § 70, sub. a(5) of the Act, we do not need to consider whether that prospective claim could by any means be transferred by him or levied upon and sold under judicial process against him, or otherwise seized, impounded or sequestered, in conformity with the further requirements of that subsection of the statute.

We regret this result as much as did the court in *Sussman*. But, as in *Sussman*, we think the remedy lies with Congress.[3]

The order of the District Court is vacated and the case is remanded to that Court for further consistent proceedings.

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[3] Legislative action might consist in amending the Internal Revenue Code to provide that bankruptcy, like death, terminates the taxable year. Or it might consist in further amendment of §70, sub. a of the Bankruptcy Act along the lines of the 1938 amendment of that section by the Chandler Act, 52 Stat. 879, to correct a similar statutory deficiency with respect to contingent interests in property. See In re Baker, 13 F. 2d 707, (C.A. 6, 1926), cert. denied; Shoun v. Baker, 273 U.S. 733, 47 S. Ct. 242, 71 L. Ed. 864 (1926); Dioguardi v. Curran, 35 F. 2d 431 (C.A. 4, 1929).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 44

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Petitioner,

v.

WILLIAM J. ROCHELLE, JR., Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 817

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,

Petitioner,

v.

WILLIAM J. ROCHELLE, JR., Trustee,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether a loss-carryback refund forthcoming under federal income tax statutes (Internal Revenue Code of 1954, Sec. 172) as a result of losses sustained prior to bankruptcy pass to the estate as "property" under Section 70a(5) of the Bankruptcy Act, or belongs to the bankrupt.

STATEMENT

The petitioner's statement (Petition, pp. 2-4) is correct. For completeness, however, we would add that the adjustments were, in large part, for losses sustained prior to the date of bankruptcy.

ARGUMENT

Petitioner correctly states that the decision below is in direct conflict with the decision of the Third Circuit in *In re Sussman*, 289 F. 2d 76 (1961), and the decision of the First Circuit in *Fournier v. Rosenbloom*, 318 F. 2d 525 (1963), which in effect followed the *Sussman* case.

The petition should not be granted, however.

First, the question presented is not of sufficient general significance or importance to require a decision of this Court. It has been considered in the circuits only three times in the more than twenty years since the creation of the net operating loss-carryback in 1942.

Second, the Court of Appeals correctly held in the present case that an inchoate right to receive a loss-carryback refund is "property" which the bankrupts could "by any means have transferred" within the meaning of Sec. 70a(5) of the Bankruptcy Act, thus entitling the creditors of the bankrupts, and not the bankrupts, to the loss-carryback refunds. A contrary decision would, as even the courts

whose decisions conflict with the present holding admit, allow an undeserved windfall to the bankrupt.

The original *Sussman* decision was criticized as wholly unnecessary by contemporary critics at the time of the decision. See Herzog, *Bankruptcy Law, Modern Trends*, 36 JNL. OF THE NAT. ASSN. OF REFS. IN BANKRUPTCY 18 (January, 1962); 14 STANFORD L. REV. 380 (1962); 40 TEXAS L. REV. 569 (1962).

Affirming the Referee and the District Court, the Court of Appeals in the present case applied the sound reasoning of these authorities to avoid the predicament of the First and Third Circuits, which felt that the language of the pertinent parts of the Internal Revenue Code and the Bankruptcy Act rendered their patently inequitable decisions inescapable.

Before the present case had been decided, other courts had begun to limit and isolate the inequitable doctrine of *Sussman*. See *In re Goodson*, 208 F. Supp. 837 (S. D. Calif. 1962), where the trustee acquired the bankrupt's claim for excessive withholding tax even though a refund was not determinable until after filing of the petition; and *In re Gignac*, 222 F. Supp. 557 (N. D. N. Y. 1963), where the trustee was allowed to credit estimated tax payments against the government's deficiency claim even though under the Internal Revenue Code, the credit is to be applied against self-employment tax liability at the end of the year.

The present holding that the right to a refund, although contingent as to amount, is transferable property within the meaning of Sec. 70a, implements the Congressional intent to secure to creditors all property of a bankrupt, *In re Baudauine*, 96 Fed. 536 (1899), rev. on other grounds, 101 Fed. 574 (1900); and it is consistent with the principle that a statute must be interpreted in light of its purpose, *In re Cantelo Mfg. Co.*, 185 Fed. 276 (1911). Certainly Congress did not intend that a bankrupt could emerge from the bankruptcy proceedings freed from his creditors and, as against them, vested with a fund which came into being as a result of the losses that precipitated the bankruptcy. Bankruptcy Courts are courts of equity, and should exercise equitable powers to the end that technical considerations will not prevent substantial justice from being done (*Pepper v. Litton*, 308 U.S. 295 (1939)) as was the case in *Sussman* and *Fournier*.

Rules of statutory interpretation, the manifest intent and purpose of the Bankruptcy Act, the abundant case authority (referred to in the opinion below) that a claim does not become a mere expectancy because it must be allowed by some authority, and plain justice and equity as between the bankrupts and their creditors, all compel the correctness of the decision below. The articles above mentioned which appeared following the *Sussman* decision, and the decision of the court below itself, clearly lead to a strong indication that the previous *Sussman* and *Fournier* decisions have little likelihood of continued application.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marvin S. Sloman, attorney for William J. Rochelle, Jr., respondent herein, and member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing brief in opposition on the petitioner by depositing the same in a United States mail box, with first class postage prepaid, addressed to counsel of record for petitioner at his post office address of record herein.

Dated: February 3, 1965.

Marvin S. Sloman

MARVIN S. SLOMAN

No. [redacted] 44

In the

Supreme Court of the United States

OCTOBER TERM 1964

GERALD SEGAL, Individually and
d/b/a SEGAL COTTEN PRODUCTS, et al.,
Petitioners,

v.

WILLIAM J. ROCHELLE, JR., Trustee,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals (R. 28-36) is reported at 336 F. 2d 298.

JURISDICTION

The judgment of the Court of Appeals was entered on September 9th, 1964 (R. 37-38). The petition was filed on the 7th day of January, 1965, and was granted on the 8th day of March, 1965. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

THE QUESTION PRESENTED

Whether a loss carryback tax item under Title 26,172 of the revised annotated statutes is "property" as defined in §70(a)(5) of the Bankruptcy Act, at the time of the filing of the bankruptcy, but prior to the end of the taxable year.

STATUTE INVOLVED

The statutory provisions involved are §70(a)(5) of the Bankruptcy Act, 11 U.S.C. §110(a)(5). The statutory provisions involved in this case are in pertinent part as follows:

> "(a) The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title * * * to all of the following cases of property wherever located * * * (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise ceased, impounded or sequestered: * * *

STATEMENT

On September 27, 1961 a voluntary bankruptcy petition was filed on behalf of Gerald Segal and Sam Segal, co-partners, trading under the firm name of Segal Cotten Products. On the same day a voluntary bankruptcy was filed on behalf of Sam Segal, individually and Gerald Segal, individually. Subsequently, after the end of the year of 1961, a claim for refund resulting from a loss carryback was made in behalf of the bankrupts. As a result of said claims for refund, the Trustee received the refund checks on the claims.

These funds, by agreement with the attorney for the bankrupts, were deposited in Trustee's bank account to be held in escrow by him pending final determination by the courts of the rights of the parties thereto. The various claims for refund were predicated and based on the entire calendar year 1961 including that year subsequent to the filing of bankruptcy.

The Referee in Bankruptcy entered an order on the 4th day of June, 1963 denying the claims of the bankrupts that they were entitled to the proceeds of the tax refund resulting from loss carryback claims paid by the Director of Internal Revenue. The bankrupts duly and timely filed their petition to review the order of the Referee in Bankruptcy. The Referee in Bankruptcy filed his certification of review, (R. 2-14) including his findings of fact, conclusions of law and opinion. The above mentioned petitions and certificate were considered by the United States District Court for the Northern District of Texas, Dallas Division. The District Court was of the opinion that the referee's order should be in all things affirmed and approved, which it did on August 27, 1963, R. 18-24).

The petitioner gave notice of appeal to the Court of Appeals for the Fifth Circuit and said Court, after due hearing, affirmed the judgment of the lower court, (R. 37-38). Petitioner then filed a motion for rehearing in due time, which was denied on October 12, 1964 (R. 44).

SUMMARY OF THE ARGUMENT

A loss carryback refund is not within the meaning of the word "property" as used in the bankruptcy statute. Courts

of Appeal in the First and Third Circuits have so held in decisions prior to the case at bar. Although the legislative purpose of the Bankruptcy Act is to secure to creditors all property of the bankrupt, an interpretation of the statutory language which attempts to bring a loss carryback refund within its scope will result in unreasonable financial burdens to both the bankrupt and his creditors. The refund involved is based on the taxpayer's experience for a taxable year which was not terminated by an adjudication of bankruptcy. Thus, at the time of bankruptcy no property right to the refund had accrued or was in existence. If the amount of the refund prior to bankruptcy is considered property within the statute, the creditors whose claims accrued subsequent to the adjudication of bankruptcy would certainly be entitled to a proportionate share of the loss carryback refund. The possible time increase in administration by the Trustee of the Bankrupt's estate while waiting for a five year carry-forward refund would seriously frustrate the purpose of the act. Also, there is no statutory authority in existence which would allow the Trustee to utilize the earnings or losses of a discharged bankrupt some four or five years in the future. Such results are clearly a perversion of the statute involved.

ARGUMENT

I.

The loss carryback refund was a mere possibility at the time of Bankruptcy and not entitled to the status of "Property" under the Bankruptcy Act.

II.

The future consequences resulting from a ruling that the loss carryback refund is "Property" as defined in the Bankruptcy Act would frustrate the statutory purpose of the Act.

I.

Prior to the case at bar this particular question relating to the Trustee's rights to a loss carryback refund has twice been considered on appeal and it has twice been found that the Trustee's right is inferior to the Bankrupt's right. The Petitioner's position that the loss carryback refund is not "Property" as defined in the Bankruptcy Act is based upon the reasoning found in the cases of *In Re Sussman*, 289 F. 2d 77 (1961) (3 CA); *Fournier v. Rosenblum*, 318 F. 2d 525 (1963) (1 CA). Such reasoning is founded upon sound legal principles.

The Statute vests title in the Trustee to all non-exempt property belonging to the Bankrupt's estate as of the date of the filing of the Petition initiating the proceeding in bankruptcy. It is the Petitioners' position that such language is exclusive of the loss carryback refund as such refund did not accrue as a right of action until the end of the taxable year which was some three months later. The mere possibility of a refund is not a property right in being, but is an abstraction too remote and uncertain to even be considered a contingent right.

In upsetting the Petitioners' position the lower court found that to approve granting the refund to the Bankrupt

would represent a windfall to which he is not entitled. The reasoning used to avoid this result is more equitable than legal and less persuasive than that used in the decisions of the First and Third Circuits. "This right of action" said the court, "springs from and rests on the fact that the income taxes theretofore paid were paid subject to adjustment in the event of future losses, and are available for that purpose to the end of providing the refund." The court concluded that "the right to adjustment is definite; the time for filing the claim is definite; only the amount of the refund is contingent and this meets the test of a possibility vested with an interest set out in *Williams v. Heard* (1891), 140 U.S. 529".

This reasoning completely disregards the language of the Internal Revenue Code of 1954 which authorizes net operating loss carrybacks (Sec. 172) on the basis of the taxpayer's experience for a taxable year. The taxpayer has no right to a loss carryback refund until the end of the taxable year in which the loss occurs. No right of action accrues at the moment the loss is incurred. This is true even though the claim is enforceable at the end of the taxable year. The principle which supports this provision of the Internal Revenue Code is that losses may be offset by profits and gains during the remaining part of the taxable year which would nullify the right to a refund. Careful analysis reveals that the loss carryback refund situation prior to the end of the taxable year is merely a possibility and *is not vested with an interest* as was the case in *Williams v. Heard,* Supra. The interest which had vested in the *Williams* case accrued when Con-

gress set up a commission to determine distribution of the fund one year *prior* to the Bankruptcy.

In *Fournier v. Rosenblum*, 318 F. 2d 525 (1963) (1 CA), the court construed the Trustee's title to property acquired as of the date of bankruptcy as having the connotation of a specific, definable ownership interest in some respect, whether it be corporeal property or a chose in action. It was decided that a loss carryback refund expectation prior to the end of the taxable year does not possess such a specific, definable ownership interest. The court said 318 F. 2d at page 527:

> "Nor is the prospect that a right of action may arise "Property". For, again as the court pointed out in Sussman (289 F. 2d at Page 78), the concept of "Title" to Property" connotes a definable ownership interest in some res., whether that res be corporeal property or a chose in action. Here, however, there was no res or chose in action in existence on the date of the filing of the petition in bankruptcy. At that time the bankrupt could point to no existing fund and to no existing right in which he had any legal or equitable interest."

The case of *In Re Sussman*, 289 F. 2d 76 (1961) specifically dealt with the question of whether or not the expectation, before the end of the taxable year, of a loss carryback refund is a right of action. It was decided that such an expectation was not a right of action or property as defined in the Bankruptcy Act because at any time prior to the end of the taxable year such an expectation does not conform to the conditions upon which the sovereign has agreed to recognize such a claim. The Court said, 289 F. 2d at page 77:

> "But in this connection it is important to keep in mind that such a right of action for a tax refund is

> created and defined by the statutes in which the United States authorizes a taxpayer to assert such a claim."

In the present situation the statutory basis of a loss carryback claim, as the court below has properly pointed out, is a taxpayer's economic experience for a unit of time, an entire taxable year. This is clear because the net operating loss upon which any claim for a carryback must be based is the excess of allowable deductions over the taxpayer's gross income as computed in a tax return for a taxable year. *Int. Rev. Code §172 (c), 26 USCA §172(c).* Thus, the statutory scheme precludes the existence of any carryback claim until the end of the taxable year.

The principle of law, that the Bankrupt's "possibility" of receiving an asset at the time of filing the Bankruptcy Petition is not an asset of the Bankrupt's estate, is not new to bankruptcy litigants. The following brief abstracts from cases in the federal system give full support to this well established legal principle. In the case of *Harlan v. Archer* (1935), 79 F. 2d 673 (4CA) the Court held that the expectation on the part of the proprietor of a canning factory, that he will be compensated by the government for the destruction of his business through the taking by the government of the land devoted to crops for his factory, is not an asset of his estate. Thus, the trustee in bankruptcy, irrespective of whether the bankrupt's debts were incurred in the operation of the canning factory, is not entitled to the refund from the government. The case of *In Re Prince* (1942), 43 F. Supp. 592 stands for the principle

that a bankrupt's commissions as testamentary trustee, which have not yet been allowed and are not yet payable, are not a part of the bankrupt estate, which the other testamentary trustees may be compelled to turn over to the trustee in bankruptcy. The court in *In Re McManaman* (1943), 50 F. Supp. 869 ruled that where the bankrupt could not retire from his employer's retirement system or withdraw any money from it without discontinuing his employment, the bankrupt's certificate of membership in the retirement system was not an "asset" of the bankrupt's estate to which the trustee in bankruptcy was entitled. These cases represent situations similar to the question involved in the case at bar. These problems were solved by placing a limitation on the statutory interpretation of "property" as defined in the Bankruptcy Act.

The best possible evidence of the intent of the legislature is the language which it employs in its statutes. Legislative history and rules of statutory construction are helpful only in situations where ambiguity exists. In the case at bar, the obvious and plain meaning of the definition of property and right of action in Sec. 70(a) (5) of the Bankruptcy Act does not include a loss carryback tax refund. Moreover, the limitations placed on the refund's existence in the Internal Revenue Code of 1954 prevent it from becoming a property right until the end of the taxable year.

II.

The lower court in its attempt to thwart the passing of a windfall to the bankrupt has overlooked the affect of its

holding in the future. The present decision has created a principle of law which affects all refunds in the future, including those which could result from losses of a business operated subsequent to the discharge of the bankrupts. The additional losses incurred subsequent to the discharge in bankruptcy would be included in determining the amount of the refund to be distributed to the trustee. A distribution *in toto* to the trustee in bankruptcy would be inequitable and prejudicial to the rights of creditors subsequent to the Discharge in Bankruptcy. The public interest would have to be protected by additional measures at an increased cost to the taxpayer.

Section 172(b) (1) (B) of the Internal Revenue Code provides that a net operating loss can be carried forward for five years as well as backward for three years. In some special instances the loss may be carried forward for as long as ten years. Section 172(B) (1) (D). This would necessitate administration of the bankrupt's estate for an additional period of time and reduce the value of the bankrupt estate to the detriment of the creditors. Such a procedure would be burdensome, cumbersome and expensive. The loss carry-forward feature of Sec. 172(b) (1) (B) of the Internal Revenue Code is an *inseparable* part of the loss carry-back refund item which is in question in the case at bar. This carry-forward feature cannot be dispelled merely because it does not arise under the facts herein. The salient point is that a decision in favor of the trustee in the case at bar would necessarily affect those trustees of bankrupt estates who wish to utilize the carry-forward feature. The insur-

mountable point is that there is no provision in the Bankruptcy Act to allow the Trustee to take advantage of the earnings or losses of the discharged bankrupt some five (5) years in the future for the purpose of utilizing the carry-forward feature which is part and parcel of the question before this Honorable Court. While the Referee and the lower courts in the case at bar have attempted to "avoid the unjust and inequitable result" of granting the bankrupt the benefit of the loss carry-back refund herein, their decision is paramount to granting the trustee power and rights relating to the earnings, income, or losses of a discharged bankrupt for the purpose of utilizing the loss carry-forward feature, which is a flagrant intrusion into the realm of the Legislature. In such a case, the words "unjust and inequitable result" would certainly apply with like force to the trustee's position. The possible consequences of the decision in the lower courts herein as opposed to the decision in the *Sussman* case and the *Fournier* case are frightening, from a legal or equitable standpoint. There is, simply, no statutory authority which does allow the Trustee to utilize the earnings or losses of a discharged bankrupt some four or five years in the future.

Petitioner submits that the language of Sec. 70(a)(5) of the Bankruptcy Act should be strictly adhered to. If this well settled and fundamental interpretation requires, as contended by respondent, alteration on the grounds of policy such as injustice to creditors of the bankrupt, relief is not with the courts, but with the legislature. Resort to legislation has been the solution in other similar situations, such

as death of a taxpayer or dissolution of a corporation. If the referee's desired result is to be accomplished, it should not be effectuated by the courts; but through a legislative change to remedy a statutory limitation upon which the taxpayer has justly relied.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

.....

HENRY KLEPAK,

Counsel for Petitioners.

August 23, 1965

CERTIFICATE OF SERVICE

I hereby certify that I have delivered to Honorable William J. Rochelle, Jr., Attorney for Respondent, whose office is in Dallas, Texas, a copy of this Brief received by him this ..... day of August, 1965.

Respectfully submitted,

.....

HENRY KLEPAK

No. [redacted] 44

In the

Supreme Court of the United States

OCTOBER TERM 1965

GERALD SEGAL, Individually and d/b/a SEGAL COTTON PRODUCTS, et al.,
Petitioners,

v.

WILLIAM J. ROCHELLE, JR., Trustee,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

OPINION BELOW, JURISDICTION AND STATUTE INVOLVED

Petitioners' brief correctly cites the opinion below and correctly states the grounds on which jurisdiction of this Court is invoked.

At page 2 of Petitioners' Brief, in the last line of the quotation of Section 70a of the Bankruptcy Act, the word "ceased" should read "seized."

QUESTION PRESENTED

The question presented by this case was correctly stated by the Court below (R23) as "* * * whether loss-carry back refunds forthcoming under the federal income tax statutes (Section 172 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 172) and arising from losses sustained prior to but in the year of bankruptcy go to creditors or the bankrupt."

This case does *not* involve rights to refunds in any taxable year after the year of bankruptcy.

This case does *not* involve business losses incurred after the date of bankruptcy.

This case does *not* involve the right to carry *forward* operating losses.

STATEMENT OF THE CASE

Petitioners' statement of the case is correct.

But to make it clear that this case is not complicated by the fact that there were post-bankruptcy operating losses in the year of bankruptcy, and that all operating losses giving rise to the refund were incurred between January 1, 1961, and September 27, 1961 (the date of bankruptcy), a portion of the fact stipulation is here quoted (R13):

> "The losses giving rise to the refund were incurred by the partnership * * * and * * * the net losses carried back were arrived at by deducting from the partnership losses which were incurred between * * * January 1, 1961 to September 27, 1961, the income of the individual bankrupts earned during the calendar year 1961 from sources other than the partnership * * * The various

claims for refund * * * were therefore predicated and based on the entire calendar year 1961."

SUMMARY OF RESPONDENT'S ARGUMENT

Congress intended to secure to creditors all non-exempt property of a bankrupt. The right to an operating loss-carryback refund is transferable property within the meaning of Section 70a(5) of the Bankruptcy Act. That the right is contingent and its realization postponed until the end of the calendar year does not prevent the right from being a "possibility coupled with an interest," which this Court has held to be "property." The right is transferable and its transferability is not affected by the Assignment of Claims Act, which Act has no applicability either to transfers by operation of law or to the validity, as between the parties, of assignments of claims against the Government.

An opposite result to that reached by the Court below would result in an unjustifiable windfall to the bankrupt at the expense of his creditors, and would encourage those contemplating bankruptcy to increase their losses so as to build up the amount of the refund.

ARGUMENT

Petitioners argue that the wording of Section 70a(5) does not expressly include a loss carry-back refund and, therefore, the statute should not be held to include such a cause of action.

But every statute must be interpreted in light of its purpose. *Martin v. National Surety Co.*, 300 U.S. 588, (1937).

Applicable statutes should be broadly construed if such a construction is necessary to carry out clear Congressional intent. *In Re Cantelo Mfg. Co.*, 185 F. 276 (D.C. Me., 1911).

Bankruptcy Courts are courts of equity and should exercise equitable powers to the end that substance will not give way to form, and that technical considerations will not prevent substantial justice from being done. *Pepper v. Litton*, 308 U.S. 295 (1939).

As pointed out by the court below in its opinion, the section in question was originally enacted in 1898 and reenacted, with modifications, in 1938, and loss carry-back refunds did not come into existence until 1942. However, in *Chandler v. Nathans*, 6 F. 2d 725 (3rd Cir. 1925), the Circuit Court of Appeals held that the right to the tax refund, which right was only created by Congress in 1918, nevertheless passed to the trustee under the Bankruptcy statute enacted in 1898.

It is fairly arguable that Congress never intended specifically to list and describe every conceivable property right which passes to the trustee in bankruptcy. Section 70a(5) is couched in broad language, and purposely so, in order that it may include rights which are created from time to time by statutes, economic developments, or otherwise. Congress merely prescribed certains tests to be applied—namely, susceptibility to transfer—to determine whether a given property right passed to the trustee.

Collier on Bankruptcy says:

> "Section 70a(5) is extremely broad and searching, and has been drawn 'to comprise all property that the bankrupt may have that may be of use or benefit to him, however small.' It includes every vested right and interest growing out of property that can properly be the subject of lawful transfer, levy or seizure—whether it be corporeal or incorporeal." Collier, Vol. 4, Sec. 70.15.

The Right is "Property"

It cannot be argued that the taxpayer's right to a net operating loss carry-back refund is not a vested statutory right. Indeed, the statute (26 U.S.C.A., Section 172, 68 A Stat. 63) begins with the words, "there shall be allowed * * *" This right cannot be characterized as the mere possibility of a gratuity.

Admittedly, the realization of the right must be postponed until the end of the taxable year when the entire loss picture may be viewed and, in this case, on September 27, 1961, the amount of refund which the government would be obligated to pay was rendered uncertain by reason of the possibility of earnings or further losses by the bankrupts after the date of bankruptcy and prior to the end of the taxable year. The court below dealt with this problem as follows: (R33)

> "A proration of the refund in the ratio of the losses before and after the filing date would be indicated in the event of losses after the filing date. Earnings after the filing date would simply reduce the amount of the refund to the trustee * * *"

But that the right to realization was postponed could not affect its status as "property." Otherwise, a note receivable

would not pass to the trustee because it was not due on the date of bankruptcy. That the amount of the refund was uncertain would not destroy the character of the right as "property." Otherwise, the bankrupt's right of action for damages to property would not pass to the trustee because the exact amount of the damages had not been, yet, judicially determined.

There are many cases in which contingent rights have been held to pass to the trustee. One of the leading cases is *Williams v. Heard*, 140 U.S. 529 (1891), where the bankrupt had a claim for the recovery of extra war risk insurance premiums paid during the Civil War. On the date of bankruptcy, in 1875, Congress had not even provided for a recovery, much less made an award. The award was not made until 1886. Nevertheless, the Supreme Court held that the contingent claim of the bankrupt passed to the trustee in 1875.

In Re Dorgan's Estate, 237 F. 507 (D.C.S.D. Iowa, 1916), was quoted by the court below as an instance where a remainder, subject to divestment, was held to pass to the trustee, even though contingent and subject to being entirely defeated.

Horton v. Moore, 110 F. 2d 189 at 191 (6th Cir., 1940), held that a contingent interest, subject to being defeated by the bankrupt's predeceasing his mother, passed to the trustee because it was "property and capable of being alienated * * *" The Court continued: "The fact that the trustee * * * could not get any portion of the corpus of the trust

estate until some future time or on the happening of a contingency be deprived of it, is not under the Statute fatal to the passing of title to [the trustee.]"

These cases involving contingent remainders are entirely analogous to the case at bar.

Kleinschmidt v. Schroeter, 94 F. 2d 707 (9th Cir., 1938), cited by the court below, is another instance of a conditional right which was held to pass. Here a joint adventurer, who had forfeited all interest in the venture except the conditional right to return of prior contributions in event of the profitable sale of the mine, became bankrupt. Such conditional right vested in the trustee.

The Right is Transferable

Section 70a(5) also requires that the right be transferable by the bankrupt. What is transferable is a question of state law. *Spindle v. Shreve*, 111 U.S. 542 (1884). The Referee, in his well-considered opinion (R 6, 19) pointed out that, under Texas law, a contingent claim is transferable by assignment and cited *Moser v. Tucker*, 26 S.W. 1044 (S.C. Tex., 1894) and *Wheeler v. Riviere*, 49 S.W. 697 (C.C.A. Tex., 1899).

As long ago as 1828, this Court, in *Comegys v. Vasse*, 26 U.S. (1 Peters) 193, (1828), held that "* * * possibilities coupled with an interest * * * may pass by assignment," and thus pass to a trustee in bankruptcy. In that case, a claim for indemnity against a foreign government, totally unenforceable at the date of bankruptcy, nevertheless passed to the trustee, since it was such a right as would pass to the

bankrupt's administrator at death. Many cases followed the *Comegys* ruling, and applied the "passing at death" test. But since the statutory language of the Act of 1800 has undergone considerable change, we do not now urge that the "passing at death" test be applied to the case at bar.

Cases Relied on by Petitioners

The Petitioners rely on *In Re Sussman*, 289 F. 2d 77 (3rd Cir., 1961), and *Fournier v. Rosenblum*, 318 F. 2d 525 (1st Cir., 1963). The court below had the benefit of both of these decisions but declined to follow them. In *Sussman*, the Third Circuit admitted, at page 78, "Perhaps this June expectation that a right to a refund would arise six or seven months later can be described as a contingent claim against the United States," but went on to hold that such a right was, nevertheless, non-assignable under the Assignment of Claims Act, 31 U.S.C., Section 203. Apparently, the Third Circuit, in making this decision, which the Court itself appeared to think regrettable, was not cited to the many cases including *Erwin v. U. S.*, 97 U.S. 392 (1878), and *U. S. v. Gillis*, 95 U.S. 407 (1877), holding that the Anti-Assignment Act has no application to assignments by operation of law, and does not affect the validity of such assignments as between the parties. The First Circuit, in *Fournier*, did not bottom its decision on the Assignment of Claims Act, but stiffly followed the *Sussman* decision on grounds of stare decisis.

In the *Fournier* decision, the only case cited was *Sussman*. No mention was made of *Williams v. Heard*, *Comegys v. Vasse*, *Horton v. Moore*, *Dorgan's Estate*, or *Kleinschmidt v.*

Schroeter, and presumably they were not considered, since had they been considered, such authority would at least have required discussion and might have brought about a contrary result.

Sussman and *Fournier* inspired well justified criticism in articles such as those in the *Journal of the National Association of Referees in Bankruptcy*, Vol. 36, p. 18 (January 1962) by Hon. Asa Herzog, 14 *Stanford Law Review* 380, and 40 *Texas Law Review*, p. 569.

Petitioners also cite *Harlan v. Archer*, 79 F. 2d 673 (4th Cir., 1935) as authority for the proposition that a mere "possibility" does not pass to the trustee. This case is inapplicable because the bankrupt had no "right", as do the bankrupts in the case at bar, and had only the hope of a gratuity from the government. The bankrupt, in *Harlan*, owned a cannery in Maryland. The government, during World War I, condemned farms in the area and forced the bankrupt out of business because no farms remained in the area on which tomatoes were raised to be canned in the bankrupt's plant. Therefore the damages sought were consequential only and not direct, and characterized by the court as a "mere expectancy, a claim founded on no legal right known to courts of law or equity, a claim which is but an appeal to the clemency of Congress to the redress of an injury, where there is no obligation on the part of the government, and the granting of relief is purely a matter of legislative discretion, cannot be regarded as property, and does not

pass in bankruptcy." In the case at bar, on the other hand, the refund is based on a right established by statute, and there is a positive legal obligation on the part of the government to make the refund; the granting of relief involves no discretion and no element of gratuity. The annotation following the report of the *Harlan* decision in 102 A.L.R. at page 159, cites many cases where contingent claims have been held to pass to the trustee, including claims for tax refunds.

Petitioners cite *In Re Prince*, 43 F. Supp. 592 (D.C. S.D.N.Y., 1942) for the proposition that a bankrupt's commissions as testamentary trustee, which have not yet been allowed and are not yet payable, do not pass to the trustee in bankruptcy. But this case relied on *In Re Furness*, 75 F. 2d 965 (2d Cir., 1935) which held that it was settled law in the State of New York that an attempt to assign unascertained and unliquidated commissions as a testamentary trustee was against public policy. There is no suggestion of any such limitation imposed by Texas law concerning the facts in the case at bar. *Furness* also pointed out that the amount of fees, if any, would ultimately depend on the executor's proper accounting, approved by the court, which accounting had yet to be done.

Petitioners also rely on *In Re McManaman*, 50 F. Supp. 869 (D.C.N.D. Ill., 1941) involving the trustee's right to an employee's interest in a retirement fund. This case correctly held that, since the employee-bankrupt had no rights in the retirement fund until he either died or resigned, the

Bankruptcy Court had no jurisdiction to order him to quit his job to enable the trustee to take over the interest in the fund. But the factual distinction between *McManaman* and the case at bar is obvious.

Practical Effect of Adoption of Rule of *Sussman* and *Fournier*

As admitted by the Third Circuit in *Sussman*, and by the First Circuit in *Fournier*, the result of those cases was a windfall to the bankrupt at the expense of his creditors.

It should also be pointed out that the adoption by this Court of the rule in *Sussman* and *Fournier* would have the practical effect of encouraging those contemplating bankruptcy to increase their losses so as to build up the amount of the refund with which they would go forth, discharged of their debts. This would open the gates to all manner of mischief, such as the employment of relatives at high salaries, sales far below cost, or any other device which would have the result of increasing operating losses at the expense of creditors with resultant unjust enrichment of the bankrupt.

Petitioners argue that the affirmance of the court below would cause bankrupt estates to be administered over many years so as to take advantage of the loss carry-*forward*. This argument is without merit. The trustee here does not contend that the estate is entitled to any portion of an operating loss carry forward, and the realization of the rights to the loss carry-back refund will not delay the administration of bankrupt estates.

Conclusion

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

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I, the undersigned counsel of record for respondent herein, hereby certify that on this .... day of September, 1965, service of a copy of this brief was accomplished on Henry Klepak, Esq., Counsel for the Petitioners, by placing a copy of this brief in a United States mail box, first class postage prepaid, addressed to said counsel at 1509 Mercantile Bank Building, Dallas, Texas.

Counsel for Respondent

SUPREME COURT OF THE UNITED STATES

No. 44.—October Term, 1965.

Gerald Segal, Individually and d/b/a Segal Cotton Products, et al., Petitioners, *v.* William J. Rochelle, Jr., Trustee.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[January 18, 1966.]

Mr. Justice Harlan delivered the opinion of the Court.

This case, presenting a difficult question of bankruptcy law on which the circuits have differed, arises out of the following facts. On September 27, 1961, voluntary bankruptcy petitions were filed in a federal court in Texas by Gerald Segal, Sam Segal, and their business partnership, Segal Cotton Products. A single trustee, Rochelle, was designated to serve in all three proceedings. After the close of that calendar year, loss-carryback tax refunds were sought and obtained from the United States on behalf of Gerald and Sam Segal under I. R. C. § 172. The losses underlying the refunds had been suffered by the partnership during 1961 prior to the filing of the bankruptcy petitions; the losses were carried back to the years 1959 and 1960 to offset net income on which the Segals had both paid taxes. By agreement, Rochelle deposited the refunds in a special account, and the Segals applied to the referee in bankruptcy to award the refunds to them on the ground that bankruptcy had not passed the refund claims to the trustee.

Concluding that the refund claims had indeed passed under § 70a (5) of the Bankruptcy Act[1] as "property . . .

[1] 30 Stat. 565, as amended, 11 U. S. C. § 110 (a)(5) (1964 ed.). In relevant part that section provides: "a. The trustee of the

which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred," the referee denied the Segals' application. The District Court affirmed the denial, and the Segals and their partnership appealed to the Court of Appeals for the Fifth Circuit.[2] That court too rejected the Segals' contention.

As the Court of Appeals here recognized, the Court of Appeals for the First Circuit in *Fournier* v. *Rosenblum*, 318 F. 2d 525, and the Court of Appeals for the Third Circuit in *In re Sussman*, 289 F. 2d 76, have both ruled squarely that a bankrupt's loss-carryback refund claims based on losses in the year of bankruptcy do not pass to the trustee but instead the bankrupt is entitled to the refunds when they are ultimately paid. Concededly, under § 70a (5) the trustee must acquire the bankrupt's "property" as of the date the petition is filed and property subsequently acquired belongs to the bankrupt. See note 1, *supra;* 4 Collier, Bankruptcy, ¶ 70.09 (14th ed. 1962). Since the tax laws allow a loss-carryback refund claim to be made only when the year has closed, see I. R. C. §§ 172 (a), (c), 6411, both the First and Third Circuits reasoned that prior to the year's end a loss-carryback refund claim was too tenu-

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estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . ."

[2] The wife of Gerald Segal and the estate of the deceased wife of Sam Segal had unsuccessfully urged before the referee their own contingent rights to half the refunds, but review on this issue was not sought.

ous to be classed as "property" which would pass under § 70a (5). Alternatively, the Third Circuit stated that because of the federal anti-assignment statute,[3] inchoate refund claims were not in any event property "which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred," as § 70a (5) also requires. Both circuits felt the result to be unfortunate, not least because the very losses generating the refunds often help precipitate the bankruptcy and injury to the creditors, but both believed the statutory language left no option.

After detailed discussion of the problems, the Court of Appeals in this case resolved that the loss-carryback refund claims were both "property" and "transferable" at the time of the bankruptcy petition and hence had passed to the trustee. 336 F. 2d 298. We granted certiorari because of the conflict and the significance of the issue in bankruptcy administration. 380 U. S. 931.[4]

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[3] Rev. Stat. § 3477, as amended, 31 U. S. C. § 203 (1964 ed.). The section, so far as relevant, states: "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

[4] Considerable commentary has been directed to the problem. Practically all the writers agree that it is desirable for the trustee to receive the refunds although a minority contend that existing law will not permit this result. See Herzog, Bankruptcy Law—Modern Trends, 36 Ref. J. 18 (1962); 60 Nw. U. L. Rev. 122 (1965); 40 Notre Dame Law. 118 (1964); 14 Stan. L. Rev. 380 (1962); 40 Tex. L. Rev. 569 (1962); 42 Tex. L. Rev. 542 (1964); 17 U. Fla. L. Rev. 241 (1964); 16 U. Miami L. Rev. 345 (1961); 110 U. Pa. L. Rev. 275 (1961).

Conceding the question to be close, we are persuaded by the reasoning of the Fifth Circuit and we affirm its decision.

I.

We turn first to the question whether on the date the bankruptcy petitions were filed, the potential claims for loss-carryback refunds constituted "property" as § 70a (5) employs that term. Admittedly, in interpreting this section "[i]t is impossible to give any categorical definition to the word 'property,' nor can we attach to it in certain relations the limitations which would be attached to it in others." *Fisher* v. *Cushman*, 103 F. 860, 864. Whether an item is classed as "property" by the Fifth Amendment's Just-Compensation Clause or for purposes of a state taxing statute cannot decide hard cases under the Bankrupcty Act, whose own purposes must ultimately govern.

The main thrust of § 70a (5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term "property" has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed. *E. g.*, *Horton* v. *Moore*, 110 F. 2d 189 (contingent, postponed interest in a trust); *Kleinschmidt* v. *Schroeter*, 94 F. 2d 707 (limited interest in future profits of a joint venture); see 3 Remington, Bankruptcy, §§ 1177–1269 (Henderson ed. 1957). However, limitations on the term do grow out of other purposes of the Act; one purpose which is highly prominent and is relevant in this case is to leave the bankrupt free after the date of his petition to accumulate new wealth in the future. Accordingly, future wages of the bankrupt do not constitute "property" at the time of bankruptcy nor, analogously, does an intended bequest to him or a promised gift—even though state law might permit all of these

to be alienated in advance. *E. g., In re Coleman*, 87 F. 2d 753; see 4 Collier, Bankruptcy, ¶¶ 70.09, 70.27 (14th ed. 1962). Turning to the loss-carryback refund claim in this case, we believe it is sufficiently rooted in the pre-bankruptcy past and so little entangled with the bankrupts' ability to make an unencumbered fresh start that it should be regarded as "property" under § 70a (5).

Temporally, two key elements pointing toward realization of a refund existed at the time this bankruptcy petition was filed: taxes had been paid on net income within the past three years, and the year of bankruptcy at that point exhibited a net operating loss. The Segals stress in this Court that under the statutory scheme no refund could be claimed from the Government until the end of the year, but as cases already cited indicate, postponed enjoyment does not disqualify an interest as "property." That earnings by the bankrupt after filing the petition might diminish or eliminate the loss-carryback refund claim does further qualify the interest, but we have already noted that contingency in the abstract is no bar and the actual risk that the refund claims may be erased is quite far from a certainty.[5] Unlike a pre-bankruptcy promise of a gift or bequest, passing title to the trustee does not make it unlikely the gift or bequest will be effected. Nor does passing the claim hinder the bankrupt from starting out on a clean slate, for any administrative inconvenience to the bankrupt will not be prolonged, see 110 U. Pa. L. Rev., at 279–280, and the bankrupt without a refund claim to preserve has more reason to earn income rather than less.

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[5] So far as losses by the bankrupt after filing but before the year's end might increase the refund—a situation not claimed to be present in this case—the Court of Appeals suggested "[a] proration of the refund in the ratio of the losses before and after the filing date would be indicated . . . ." 336 F. 2d, at 302, n. 5.

We are told that if this loss-carryback refund claim is "property," that label must also attach to loss-carryovers, that is, the application of pre-bankruptcy losses to earnings in future years. Since losses may be carried forward five years and in some cases even seven or ten years, I. R. C. §§ 172 (b)(1)(B)–(D), great hardship for the estate is foreseen by petitioners in keeping it open for this length of time. While in fact the trustee can obviate this detriment to the estate—by selling a contingent claim in some instances or simply forgoing it—inconvenience and hindrance might be caused for the bankrupt individual. Without ruling in any way on a question not before us, it is enough to say that a carryover into post-bankruptcy years can be distinguished conceptually as well as practically. The bankrupts in this case had both prior net income and a net loss when their petition was filed and apparently would have deserved an immediate refund had their tax year terminated on that date; by contrast, the supposed loss-carryover would still need to be matched in some future year by earnings, earnings that might never eventuate at all.

II.

Having concluded that the loss-carryback refund claims in this case constituted "property" at the time of the bankruptcy petition, it remains for us to decide whether in addition they were property "which prior to the filing of the petition . . . [the bankrupt] could by any means have transferred . . . ."[6] The prime ob-

[6] The "choice of law" rules relevant to this question are not in dispute. What would constitute a "transfer" is a matter of federal law. 4 Collier, Bankruptcy, ¶ 70.15, at 1035–1036 and n. 25 (14th ed. 1962). Whether an item could have been so transferred is determined generally by state law, save that on rare occasions overriding federal law may control this determination or bear upon it. *Id.*, at 1034–1035 and n. 22. The Segals were Texas residents, the business was apparently based in Texas, and the bankruptcy court was located there; no other State's law is claimed to be relevant.

stacle to an affirmative answer is 31 U. S. C. § 203, which renders "absolutely null and void" all transfers of any claim against the United States unless among other conditions the claim has been allowed and the amount ascertained. See n. 3, *supra*. Plainly since the tax laws calculate the refund only on the full year's experience after the year has closed, the claims in the present instance could not have been allowed or ascertained at the time the petition was filed.

The respondent argues that the transferability requirement of § 70a (5) can be met by relying on the long-established rule that § 203 does not apply to prevent transfers by "operation of law." See *United States* v. *Aetna Surety Co.*, 338 U. S. 366, 373–374; *Goodman* v. *Niblack*, 102 U. S. 556, 560.[7] The phrasing of § 70a (5), however, suggests that it contemplates a voluntary transfer and is not satisfied simply because property could have been transferred by operation of law, such as by death, bankruptcy, or judicial process. Not only is there practically no form of property that would not be transferable under the broader reading, but it also makes redundant the alternative route for complying with § 70a (5) through showing that the property "might have been levied upon and sold under judicial process . . . ."[8] Admittedly, the Bankruptcy Act defines the word "transfer" in its general definitional section to

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[7] This exception is the simplest reason why § 203 does not interfere with the vesting in the trustee of property coming within § 70a (5), for all transfers under § 70a are explicitly by "operation of law," see n. 1, *supra;* but of course property must still qualify as transferable within the meaning of § 70a (5).

[8] See n. 1, *supra*. The respondent has not argued that under Texas law the Segals' inchoate refund claims would be subject to such judicial process, and apparently in Texas the claims' contingent status would render this argument quite doubtful. See 26 Tex. J. 2d, Garnishment § 17 (1961), and cases there cited.

include at least certain transfers that are "involuntary,"[9] but legislative history indicates that the introduction of this latter term into the Act 40 years after its framing was not aimed at § 70a (5) at all. See H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 5; Analysis of H. R. 12889, 74th Cong., 2d Sess., p. 7 (Comm. Print).

Difficulty in defining the term "transfer" is enhanced by the absence of any explanation for Congress having made transferability a condition in the first place. Bankruptcy Acts prior to the present one enacted in 1898 had no like limitation on the trustee's succession to property, see Bankruptcy Acts of 1867, § 14, 14 Stat. 522; of 1841, § 3, 5 Stat. 442; and of 1800, §§ 5, 13, 2 Stat. 23, 25, and under the predecessor Act claims against the Government passed without impediment to the trustee. See, *e. g.*, *Erwin* v. *United States*, 97 U. S. 392. This history and the chance that the 1898 limitation sought only to respect state policies against alienating property such as a contingent remainder or spendthrift trust fund argues for flatly ignoring the limitation in this instance. See 14 Stan. L. Rev., at 383–386. Nevertheless, we have been shown no legislative history on the point, and an uncertain guess at Congress' intent provides dubious ground for disregarding its plain language. In all events, we are not prepared to accept this argument, just as we cannot now go beyond a narrow definition of the term

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[9] Bankruptcy Act, § 1 (30), as amended by the Chandler Act, 52 Stat. 842, as amended, 11 U. S. C. § 1 (30) (1964 ed.), pertinently reads: "'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, pledge, mortgage, lien, encumberance, gift, security, or otherwise . . . ."

"transfer," in a case in which these points have not been thoroughly briefed by the parties.

The Court of Appeals determined that despite § 203 a sufficient voluntary transfer of the loss-carryback refund claim could have been made prior to bankruptcy to satisfy § 70a (5), and on balance we share this view. In *Martin* v. *National Surety Co.*, 300 U. S. 588, 596, a unanimous Court held that § 203, in spite of its broad language, "must be interpreted in the light of its purpose to give protection to the Government" so that between the parties effect might still be given to an assignment that failed to comply with the statute. The opinion reasoned that after claims have been collected by the assignor, requiring compliance with the invalid assignment by transfer of the recovery to the assignee presented no danger that the Government might become "embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability." 300 U. S., at 594–597. While other circumstances encouraged *Martin* to uphold the assignment and this Court has not faced the problem head-on since that time, we find no reason to retreat now from the basic holding in *Martin* which was both anticipated and followed by a number of other courts, state and federal. See *California Bank* v. *United States Fid. & Guar. Co.*, 129 F. 2d 751; *Royal Indem. Co.* v. *United States*, 93 F. Supp. 891; *Leonard* v. *Whaley*, 91 Hun 304, 36 N. Y. S. 147; Ann., 12 A. L. R. 2d 460, 468–475 (1950). Among these States is Texas, whose precedents leave little doubt that an assignment of the claims at issue would be enforced in equity in the normal case. *Trinity Univ. Ins. Co.* v. *First State Bank*, 143 Tex. 164, 183 S. W. 2d 422; see *United Hay Co.* v. *Ford*, 124 Tex. 213, 76 S. W. 2d 480 (dictum).

It should not be pretended that this contemplated "transfer" is one in the fullest sense that term permits.

For example, this Court has ruled that one holding a claim invalidly assigned under § 203 may not sue the Government upon it though he join his assignor as well. *United States* v. *Shannon*, 342 U. S. 288. Yet it remains true that a Texas court of equity could and would compel the assignment of any refund received, if indeed it might not try to compel a reluctant assignor to collect the claim or make it over by a valid assignment when that became possible. This, we believe, suffices to make the Segals' claims transferable within the meaning of § 70a (5). Cf. 4 Collier, Bankruptcy, ¶ 70.37, at 1293, n. 6 (14th ed. 1962).

Affirmed.